SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

PIER CARLO FALOTTI,

Petitioner,

v.

ORACLE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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102 pp

QUESTIONS PRESENTED

This case involves the Ninth Circuit's protectionism of an American corporation, Respondent Oracle Corporation ("Oracle"), in derogation of the Swiss legal and contractual rights of its foreign employee, Petitioner Pier Carlo Falotti ("Falotti"), which has resulted in Falotti being wrongfully deprived of more than $85 million worth of employee stock options.

The questions presented for review are the following:

1. In validating a finding by Oracle's Compensation Committee that Falotti "ceased to be employed" for purposes of a *California law* stock option plan, was it consistent with this Court's well-established choice-of-law and international comity principles for the Ninth Circuit to refuse to respect and enforce Falotti's contractual employment rights solely because they arose under a *Swiss law* employment agreement between Falotti and Oracle?

2. In validating a finding by Oracle's Compensation Committee that Falotti "ceased to be employed" for purposes of a *California law* stock option plan, was it consistent with this Court's well-established choice-of-law and international comity principles for the Ninth Circuit to treat Falotti as a *purely at-will employee* in California despite Falotti's substantive contractual protections against termination conferred by Oracle under their *Swiss law* employment agreement?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The names of all parties to the proceedings below are contained on the caption page to this Petition For Writ Of Certiorari.

Because Falotti is a natural person rather than a nongovernmental corporation, the corporate disclosure statement requirement of Rule 29.6 does not apply.

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PETITION FOR WRIT OF CERTIORARI

Falotti respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit rendered its judgment pursuant to a published opinion reported at 319 F.3d 1106, which affirms a grant of summary judgment to Oracle by the United States District Court for the Northern District of California in a published opinion reported at 187 F.Supp. 2d 1184. *See* (Apps. A & B at 1a-63a).

JURISDICTION

The Ninth Circuit entered judgment on February 11, 2003, and subsequently denied Falotti's petition for rehearing and suggestion for rehearing *en banc* on April 9, 2003. *See* (App. C at 64a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

IMPORTANT FEDERAL QUESTIONS INVOLVED

The present case involves the Ninth Circuit's violation of the so-called *international comity doctrine* established by a long line of decisions from this Court dating back to at least the 1830s. Pursuant to that doctrine, United States federal courts are generally required to respect and enforce all valid contracts between private parties that were made under the auspices of, or that otherwise incorporate, foreign law. (*See, infra*, pp. 13-16). Here, however, the Ninth Circuit has declined to give effect to the parties' contractual rights and obligations arising under their Swiss employment agreement which has resulted in Falotti being wrongfully deprived of over $85 million worth of Oracle stock options.

Moreover, the present case also involves the Ninth Circuit's erroneous conclusion that this Court's well-established choice-of-law principles are somehow at odds with the international comity doctrine. According to the Ninth Circuit, in order to uphold a California choice-of-law provision in Oracle's stock option plan, it was required to reject the mandate of international comity by disregarding Falotti's underlying contractual rights conferred by the parties' Swiss employment agreement. Such reasoning is contrary, however, to hundreds of years of precedent that began when English common law courts established a standard approach for accommodating the respective interests of choice-of-law and international comity without doing violence to either. (*See, infra*, pp. 17-19).

In our present era of globalization, American courts are increasingly confronted with business disputes between multinational corporations and their foreign-based employees which involve multiple layers of contractual agreements with inconsistent choice-of-law provisions. Quite often stock option plans are at the heart of these disputes, given that for many industries stock options have now emerged as the principal form of employee compensation. American-based stock option plans may well require analysis of a foreign employee's underlying employment rights, which in turn are governed by the employment laws of foreign countries. Contrary to what the Ninth Circuit has decided here, the proper approach to resolving such cases is not for American courts to decline to enforce validly acquired foreign law rights. Accordingly, a clarification from this Court as to these important federal questions situated at the intersection of choice-of-law and international comity principles would be invaluable.

STATEMENT OF THE CASE

I. Falotti's Swiss Employment Agreement With Oracle

In late 1995, Oracle began soliciting Falotti to leave his position as a successful international executive for AT & T to join Oracle. Among the principal inducements that Oracle offered to Falotti was a lucrative stock option package.

In September of 1996, Falotti and Oracle executed a written employment agreement by which Falotti became Senior Vice President of Oracle's European, Middle Eastern, and African business operations. Falotti's employment was to be based in Geneva, Switzerland.

Falotti successfully negotiated for an express Swiss choice-of-law provision to govern the parties' employment agreement. Accordingly, as mandated by Swiss law, the employment agreement incorporated at least two important statutory protections from Title X of the Swiss Code of Obligations. *See, e.g.*, ALEXANDRE BERENSTEIN ET AL., LABOUR LAW IN SWITZERLAND 57 (1st ed. 2001).

First, the employment agreement entitled Falotti to a two-month *termination notice period* during which Oracle contractually relinquished any right to effect a termination of their employment relationship. Indeed, Swiss employment continues in full force and effect throughout such a notice period, and all rights and obligations between employer and employee remain wholly intact.[1] Moreover, even where a Swiss

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[1] *See, e.g.*, Alfred Blesi, *Die Freistellung des Arbeitmehmers* [*Employee Leave*], in 19 Le droit du travail en pratique [19 Employment Law in Practice] (Gabriel Aubert ed., 2000); Das Obligationenrecht [The Code of Obligations] (Manfred Rehbinder annot. 1992).

employer might elect to voluntarily release an employee from further work duties, their employment relationship nonetheless persists until the termination notice period has completely run its course. *See G. v. P. SA*, ATF 118 II 140 (Swiss Supreme Crt. [2] May 20, 1992).

Second, the employment agreement also afforded Falotti a *"forbidden period"* guaranteeing his continuing employment during the first 90 days of any incapacitating illness. By granting a Swiss law "forbidden period," Oracle contractually agreed that any attempt to terminate Falotti would be legally "null and void" until after such a period had fully elapsed.

In the proceedings below, Oracle raised no challenges to the validity or enforceability of the parties' Swiss employment agreement.[3] Nor did Oracle ever dispute the scope or substance of the Swiss statutory protections incorporated therein. As the Ninth Circuit correctly observed, "under...the Employment Agreement, Falotti was not termin[able] until after the end of the applicable notice periods." (App. A at 7a).

II. Stock Options Granted To Falotti Under Oracle's California Stock Option Plan

During Falotti's ensuing four years of employment with Oracle, his "excellent" and "superior" work earned him several substantial grants of stock options that were scheduled to vest in increments over time.

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[2] The Swiss Supreme Court (i.e., the Tribunal fédéral suisse) is the highest authority for employment law in Switzerland.

[3] At most, Oracle attempted to argue that Falotti had contractually waived a portion of the termination notice period otherwise due under their Swiss employment agreement, but that argument was expressly rejected by the Ninth Circuit. *See* (App. A at 7a-8a).

Oracle issued these grants pursuant to a stock option plan which -- in conjunction with related grant and exercise notice agreements -- contained an express California choice-of-law provision and an integration clause. The stock option plan purported to give a Compensation Committee, comprised of two outside directors from Oracle's Board, discretionary authority to construe and interpret its terms, and to resolve any disputes with optionees that might arise thereunder. However, the Committee's discretionary authority was both *contractually* circumscribed by the requirement that it be exercised consistently with the language and purposes of the stock option plan, and *legally* circumscribed by California's implied covenant of good faith and fair dealing.

Under the express language of the stock option plan, an optionee was entitled to continue vesting in stock options until such time as he "ceases to be employed" by Oracle. Nowhere in the plan, however, was this "ceases to be employed" language in any manner explained or defined. Indeed, the closest the plan came to addressing employment-related issues was to state that where an optionee such as Falotti had a written agreement in place with Oracle, the working "relationship is [only] terminable in accordance with the terms of any agreement you have with the company governing the relationship." Thus, it was Falotti's bargained-for expectation that for all stock option purposes, his employment could only be terminated in accordance with the parties' Swiss employment agreement.

III. Oracle's Unlawful Attempt To Terminate Falotti On May 31, 2000

On May 30, 2000, Falotti's physician diagnosed him as suffering from a serious state of deep depression and exhaustion accompanied by somatization -- i.e, by severe physical side effects. In keeping with Swiss

practice, the physician issued a medical certificate attesting to Falotti's incapacity to work by reason of illness.

The following day, on May 31, 2000, Oracle abruptly attempted to terminate Falotti upon the direct orders of its Chairman and CEO, Lawrence Ellison ("Ellison"). Ellison informed Falotti by telephone that he was terminated "effective immediately," and Ellison instructed Falotti to stop performing further services for Oracle. Motivating Ellison's actions was the fact that just four days later Falotti was scheduled to begin vesting in over *2 million shares* of Oracle stock options worth in excess of *$85 million.*

By purporting to terminate Falotti "effective immediately," Oracle acted in knowing and intentional breach of the parties' Swiss employment agreement. Indeed, as Oracle admits, it was thereby refusing to honor Falotti's contractual and legal rights to both **(i)** a two-month termination notice period of continuing employment; and **(ii)** a "forbidden period" protecting Falotti from termination during the first 90 days of any incapacitating illness.[4] As Oracle's management boasted, Falotti would accordingly "get nothing" until he has "appealed to the very last stage" of the judicial process which "you can expect to...to be a very long time." To this day, Oracle has wrongfully withheld from Falotti all salary, benefits, and stock option vests that accrued during the termination notice and "forbidden" periods in which his employment status remained fully intact.

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[4] Never in the proceedings below did the courts find there to be any legal justification for Oracle's acknowledged breaches of the parties' Swiss employment agreement.

IV. The Finding By Oracle's Compensation Committee That Falotti "Ceased To Be Employed" On May 31, 2000

On June 30, 2000, Oracle's Compensation Committee[5] held a special meeting to determine when Falotti "ceased to be employed" for purposes of the stock option plan. At that meeting, the Committee members concluded that Falotti's contractual rights under the Swiss employment agreement were completely "irrelevant to...[their] determination of termination of employment," and that their own "authority [was not] limited in any way by [these] Swiss law" rights. Accordingly, the Committee admittedly gave no consideration whatsoever to Oracle's contractual and legal obligations to provide the termination notice and "forbidden" periods that should have served to guarantee Falotti's continuing employment.[6]

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[5] The only two members of Oracle's Compensation Committee -- viz., Michael Boskin and Donald Lucas -- are central figures in a highly publicized decision handed down by the Court of Chancery for Delaware just three weeks ago. *See In Re Oracle Corp. Derivative Litigation*, C.A. No. 18751, slip op. at 6, 37 (Del. Ch. June 13, 2003). There, Vice Chancellor Strine held that genuine fact issues exist as to whether certain members of Oracle's Board are so biased in favor of management that they are incapable of exercising independent judgment. *Id.* Vice Chancellor Strine's opinion notes that by late 2000, Messrs. Boskin and Lucas had already been awarded personal grants of $31 million and $27 million in Oracle stock options respectively, and that they had intimate personal ties to Stanford University at a time when Ellison was contemplating making a $150 million donation to that school. *Id.*

[6] The Compensation Committee likewise ignored the express language in the stock option plan providing that the employment "relationship is [only] terminable in accordance with the terms of any agreement you have with the company governing the relationship." (*See, supra*, p. 5).

Treating Falotti as though he was a *purely at-will employee* with no employment rights at all, the Compensation Committee decided that Falotti "ceased to be employed" at the moment Ellison had purported to terminate him "effective immediately" and relieve him of further performance obligations. Based upon this flawed analysis which disregarded the parties' Swiss employment agreement, the Committee held that Falotti was not entitled to any Oracle stock options scheduled to vest subsequent to May 31, 2000.[7]

Tellingly, in Falotti's case the Compensation Committee interpreted the "ceased to be employed" language from the stock option plan in a manner directly contrary to the prior understanding of Oracle's own management and attorneys. Indeed, Oracle's written policy had previously been "not [to] dispute any entitlement to options vesting during notice" periods, and Oracle had applied that policy to Falotti's contemporaneously terminated co-workers.[8] For his part, Ellison had acknowledged in writing his conviction that Falotti was entitled to notice period vesting, and he attributed that belief to advice received from Oracle attorneys that Falotti had legal rights to continue vesting for so long as he remained a Swiss employee.

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[7] The Committee members later admitted in deposition that when an Oracle employee is terminated unlawfully under his employment agreement, that termination "is not valid" for purposes of the stock option plan, and the employee would therefore retain all rights to continued vesting in stock options. Thus, given the Committee's appreciation as to the potential significance of the parties' Swiss employment agreement, their decision to completely disregard it when deciding Falotti's fate was clearly taken in bad faith.

[8] The only distinction between Falotti and his contemporaneously terminated co-workers was that Oracle had granted an exponentially larger number of stock options to Falotti than to them.

Despite half-hearted efforts to defend the legitimacy of the Compensation Committee's decision, Oracle management initially approved a conditional stock option settlement proposal to Falotti of $40 million. But Oracle quickly withdrew this settlement proposal, and filed a complaint against Falotti in the District Court just three days after the Committee has conducted its special meeting.

V. The Proceedings In The Courts Below

A. The District Court[9]

The complaint filed by Oracle on July 3, 2000 sought a declaratory judgment that Falotti had "ceased to be employed" for purposes of the stock option plan on May 31, 2000, and accordingly that Falotti was not entitled to any stock options scheduled to vest thereafter. Falotti counterclaimed by alleging, *inter alia*, that Oracle had breached their Swiss employment agreement, and that the Compensation Committee had abused its discretionary authority in breach of the California stock option plan and the good faith covenant implied therein.[10] On September 17, 2001, the District Court resolved the parties' cross-motions for summary judgment by finding as a matter of law that Oracle's request for declaratory relief should be granted, and that Falotti's

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[9] The District Court exercised subject matter over this case pursuant to 28 U.S.C. § 1332(a)(2).

[10] Falotti's position in this case has always been that he did not "cease to be employed" on May 31, 2000 because the termination notice and "forbidden" periods granted by Oracle under their Swiss employment agreement needed to be respected and enforced as matter of law, and that they provided him with contractual and legal rights to continued employment through at least September 30, 2000. Consequently, Falotti is entitled to damages corresponding to the value of all stock options scheduled to vest between May 31, 2000 and September 30, 2000 while he remained a full-time Oracle employee.

counterclaims should be denied. *See* (App. B at 18a-63a).

In upholding the determination made by the Compensation Committee, the District Court refused to respect and enforce Falotti's contractual rights arising under his Swiss employment agreement with Oracle. As the Court reasoned, the California "choice-of-law provision and integration clauses in the stock option agreement evidence that the [stock option] plan was intended to be [entirely] self contained." (App. B at 36a). Accordingly, giving effect to Falotti's Swiss law rights under the employment agreement would be tantamount to improperly "overrid[ing] an express choice-of-law provision in an internationally-administered stock-option plan." (*Id.* at 37a).

Since there purportedly was no "require[ment] to consider [Falotti's] Swiss law" rights, the District Court concluded that Falotti should be treated as though he was a *purely at-will employee* in California with no contractual protections whatsoever. (App. B at 36a).[11] Pursuant to this legal fiction, the Court held that "[u]nder California law, Mr. Falotti was not a full-time employee after May 31 [, 2000], since he was told he was terminated, he was relieved of his duties, his password was changed, his office was cleared out, and he performed no active work at all for Oracle." (*Id.* at 35a).

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[11] In fact, the District Court purported to distinguish several cases relied upon by Falotti on grounds that they involved "employment contracts with fixed durations," as opposed to the purely at-will agreement that would ostensibly exist between Falotti and Oracle if their Swiss employment agreement could be completely disregarded. (App. B at 50a).

B. The Ninth Circuit[12]

On February 11, 2003, the Ninth Circuit affirmed the District Court's grant of summary judgment to Oracle by likewise refusing to respect and enforce Falotti's contractual rights arising under his Swiss employment agreement. (App. A at 1a-17a).

According to the Ninth Circuit, the "Stock Option Agreement is independent of the Employment Agreement," and "contains a choice-of-law clause choosing California law." (*Id.* at 9a-10a). But because this clause was purportedly "incompatible" with the Swiss choice-of-law provision governing the parties' employment agreement, giving effect to Falotti's contractual rights under the employment agreement would be tantamount to improperly "ignoring the [California] choice-of-law clause in favor of Swiss law." (*Id.* at 10a). Thus, as the Ninth Circuit would have it, Falotti's contractual employment rights could not be enforced without "assimilat[ing]...[the] Stock Option Agreement into every Oracle employment contract governed by local laws," which "would severely hamper an employer's ability to maintain uniform stock-option plans for employees residing in different jurisdiction around the world." (*Id.* at 10a).

Relying upon this same faulty logic, the Ninth Circuit also embraced the legal fiction advanced by the District Court that Falotti should be treated as though he was a *purely at-will employee* in California with no contractual protections whatsoever. Indeed, having already found that the parties' Swiss employment agreement could properly be disregarded, the Ninth Circuit saw "little merit" in Falotti's assertion that "even under California law he was entitled to a notice period." (App. A at 14a). To the contrary, the Ninth

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[12] The Ninth Circuit exercised jurisdiction over this case pursuant to 28 U.S.C. § 1291.

Circuit held that Falotti was subject to California Labor Code § 2922 -- i.e., the state statute addressing purely at-will employment relationships -- and it cited to several California cases establishing legal standards for purely at-will employment. (*Id.* at 14a, 12a)(*citing Guz v. Bechtel*, 24 Cal. 4th 317, 8 P.3d 1089 (2000); *Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620 (1995). Because Falotti was ostensibly nothing more than a purely at-will employee, the Ninth Circuit concluded that he "ceased to be employed" on May 31, 2000 when Oracle "ceased to make use of Falotti's services." (*Id.* at 15a).[13]

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[13] Prior to filing suit below, Oracle never anticipated benefiting from the legal fiction that Falotti could be treated as though he was a purely at-will employee in California. To the contrary, Oracle management openly criticized their own stock option plan as flawed because it did "not exclude the possibility of [damages] compensation for loss of stock options should the employment contract be unlawfully terminated." Consequently, *after* its stock option dispute with Falotti arose, Oracle implemented *prospective* amendments to its stock option plan to address on a going-forward basis the Falotti fact pattern in which an optionee had contractual protections against termination arising from an employment agreement. For the first time ever, these new amendments specially defined "ceases to be employed" to mean "ceases to provide services to the Company," *irrespective* of whether Oracle had terminated the optionee "unlawful[ly]," or "in breach of any contract of employment," or without the legally required termination "notice" period. By engaging in the legal fiction that Falotti was a purely at-will employee in California, in essence the Ninth Circuit has retroactively applied this new standard to Falotti, even though his stock option rights are governed by the *old version* of Oracle's stock option plan from which such a standard was absent.

REASONS FOR GRANTING THE PRESENT PETITION

I. The Ninth Circuit Violated This Court's Well-Established Choice-of-Law And International Comity Principles By Refusing To Respect And Enforce The Swiss Law Employment Agreement Between Falotti And Oracle

The Ninth Circuit held that, in determining when Falotti "ceased to be employed" for purposes of a California law stock option plan, Oracle's Compensation Committee could permissibly disregard all of Falotti's contractual employment rights arising under his Swiss law employment agreement with Oracle. In fact, the Ninth Circuit itself declined to give effect to Falotti's Swiss contractual rights by treating him as a *purely at-will employee* in California. As demonstrated below, however, such an approach violates this Court's well-established international comity principles which require valid foreign law contracts be to fully respected and enforced in United States federal courts.

A defining attribute of our common law heritage is that "Courts of justice have continually acted upon [international comity principles]...as a part of the voluntary law of nations." *The Bank Of Augusta v. Earle*, 38 U.S. 519, 589 (1839). As this Court has explained, so-called *international comity* "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. United States District Court For The Southern District Of Iowa*, 482 U.S. 522, 544 n.27 (1987). In short, international comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the

rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

Where jurisdiction has been properly established, international comity principles generally require a United States federal court to respect and enforce all private rights arising under foreign law. Indeed, our federal courts customarily "lay[] hold of all subjects of litigation, [even] though they are relative to the laws of the most distant part of the globe," and "[r]ights which have accrued by the law of a foreign state are treated as valid everywhere." *Dennick v. Railroad Co.*, 103 U.S. 11 (1880). As this Court has uniformly held, "when an action is brought upon a cause arising outside of the jurisdiction, it always should be borne in mind that the duty of the court is not to administer its notion of justice, but to enforce an obligation that has been created by a different law." *Cuba Railroad Co. v. Crosby*, 222 U.S. 473, 478 (1912). *Accord Cook v. Moffat*, 46 U.S. 295, 314 (1847)("the enforcement of obligations, when intended to be performed according to the laws of other communities, constitutes a right and a duty recognized by the comity existing amongst all civilized governments.") (Daniel, J., concurring).[14] The only recognized exception to these principles occurs where enforcement of foreign rights would be "repugnant to the laws or [public] policy of the forum." *The Bank Of Augusta*, 38 U.S. at 589.

The important purposes served by the international comity doctrine are at least twofold. On the one hand, the doctrine helps to advance international relations by "'produc[ing] a friendly intercourse between the sovereignties to which...[the litigants] belong.'" *Hilton*, 159 U.S. at 165. *Cf. Societe Nationale*, 482 U.S. at 555

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[14] *See also Hilton*, 159 U.S. at 233 ("the rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced in our courts")(Fuller, C.J., dissenting).

(international comity "is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill" among nations) (Blackmun, J., concurring in part). On the other hand, the doctrine is equally critical to ensuring fair outcomes for private litigants, since it "contributes so largely to promot[ing] justice between individuals." *The Bank Of Augusta*, 38 U.S. at 589. Indeed, as this Court has observed, "where the rights of individuals are concerned...[i]t is needless to enumerate...the [countless] instances in which" international comity principles have been invoked to secure the vindication of such rights. *Id.*

In the case at bar, international comity principles are fully implicated by Falotti's assertion of the contractual rights arising under his Swiss law employment agreement with Oracle. Indeed, international comity principles have "been recognized and applied without qualification in the courts of this country to cases arising on contracts." *Dennick*, 103 U.S. at 11.[15] As this Court has stated the general rule, "courts of one sovereignty will not refuse to give effect to the principle of comity by declining to enforce contracts which are valid under the laws of another sovereignty" unless they "violate the public policy of the state where the enforcement of the foreign contract is sought." *Bond v. Hume*, 243 U.S. 15, 21 (1917). *Accord The Bank Of Augusta*, 38 U.S. at 589 ("Courts of justice have always expounded and executed" foreign contracts unless "repugnant to the laws or policy of their own country"); *Cook*, 46 U.S. at 316 ("courts will always...respect and enforce foreign contracts...whenever the contracts are valid at home,

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[15] *Accord The Bank Of The United States v. Donnally*, 33 U.S. 361, 372 (1834)(enforcement of foreign contracts "depends upon principles of international comity, and a sense of justice."); *The Bank Of Augusta*, 38 U.S. at 589 (foreign contracts are "familiar examples" of subject matter to which international comity principles apply).

and not immoral or against public policy elsewhere.")(Woodbury, J., concurring).

Here, the Ninth Circuit has clearly violated the international comity doctrine by declining to give effect to Falotti's Swiss law contractual rights.[16] As a result of the termination notice and "forbidden" periods granted by Oracle under the parties' employment agreement, Falotti acquired contractual and legal rights guaranteeing him continued employment, and Oracle relinquished any rights to effect Falotti's termination until after those contractual periods had fully elapsed. (*See, supra*, pp. 3-4). But the Ninth Circuit has improperly refused to respect and enforce Falotti's contractual rights by allowing the Compensation Committee to completely disregard the Swiss law employment agreement, and by validating the Committee's finding that Falotti "ceased to be employed" on May 31, 2000 before his contractual notice and "forbidden" periods had even begun to run their course. (*See, supra*, pp. 11-12). Tellingly, the Ninth Circuit's opinion treats Falotti as though he was a *purely at-will employee* in California bereft of any contractual employment rights whatsoever. (*Id.*).

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[16] Oracle never has argued, nor could it have argued, that the substance of Falotti's contractual rights arising under his Swiss employment agreement was somehow repugnant to the laws or public policy of California. Accordingly, the present case does not fall within any recognized exception to the application of standard international comity principles.

II. The Ninth Circuit Violated This Court's Well-Established Choice-Of-Law And International Comity Principles By Treating Falotti As A Purely At-Will Employee In California Despite Oracle's Conferral Of Substantive Contractual Protections Against Termination Under Their Swiss Law Employment Agreement

Central to the Ninth Circuit's erroneous holding is its mistaken belief that this Court's well-established choice-of-law principles are somehow at odds with the international comity doctrine. (*See, supra*, pp. 11-12). Indeed, the Ninth Circuit apparently concluded that in order to properly honor the California choice-of-law provision in Oracle's stock option plan, it was required to reject the mandate of international comity by refusing to respect and enforce Falotti's Swiss law rights under his employment agreement. (*Id.*). Accordingly, the Ninth Circuit resolved this imagined conflict by disregarding the Swiss employment agreement, and treating Falotti as though he was a purely at-will employee for purposes of California law. (*Id.*).[17]

As this Court has previously explained, however, choice-of-law principles are not antagonistic to the concept of international comity as the Ninth Circuit wrongly presumed. To the contrary, "choice-of-law...from the very beginning had been linked to international comity." *Societe Nationale*, 482 U.S. at 555 (Blackmun, J., concurring in part). This historical nexus between the two doctrines has

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[17] Even were the Ninth Circuit correct in believing that international comity principles must be jettisoned in the face of a contractual choice-of-law provision (which it was not), the result reached below would still be unwarranted. Indeed, the Ninth Circuit's analysis conveniently overlooks the fact that here there were actually *two* contractual choice-of-law provisions at work -- *viz.*, a California law provision in the stock option plan, *and* a Swiss law provision in the employment agreement.

provided the courts with ample opportunities for finding ways of accommodating their respective interests without doing violence to either.

One such accomodation established by centuries of precedent addresses precisely the situation presented by the case at bar. *See Slater v. Mexican National Railroad Co.*, 194 U.S. 120, 133-34 (1904)(Fuller, CJ., dissenting)(*citing The Halley*, L. R. 2 P. C. 202). Indeed, the English common law courts were long ago confronted with the question of how to reconcile choice-of-law considerations favoring the forum when litigation is brought on a "contract entered into a foreign country where, by express reference, or by necessary implication, the foreign law is incorporated with the contract." *Id.* The answer that has evolved to this question is that a court regards incorporated foreign law as "facts" establishing the substance of the parties' contractual rights, and "then applies and enforces its own law so far as it is applicable to the case thus established." *Id.*

Pursuant to this long-standing common law tradition, the Ninth Circuit erred in treating Falotti as a purely at-will employee in California. Indeed, Falotti's Swiss employment agreement established the "fact" that he was the beneficiary of an at-will employment relationship *modified by* substantive contractual protections against termination in the form of notice and "forbidden" periods. Thus, in applying California law under the stock option plan, both the Compensation Committee and the Ninth Circuit *were required to take Falotti as they found him* -- *i.e.*, as an employee with pre-existing and fully enforceable contractual rights against Oracle which *precluded* a purely at-will termination. Contrary to the Ninth Circuit's misguided "ceases to be employed" analysis, the proper legal question to be asked was *not* "what would the effective date of termination be under California law for a *hypothetical* employee with a

purely at-will employment relationship?" Rather, the proper legal question was "what would the effective date of termination be under California law for an employee who enjoyed Falotti's *actual* contractual protections?"

Ironically, prior to issuing its erroneous opinion herein, the Ninth Circuit had previously decided other cases consistently with the common law precedent set forth above. For example, in *McGhee v. Arabian American Oil Co.*, 871 F.2d 1412 (9th Cir. 1989), the plaintiff sued for wrongful termination under an employment agreement that incorporated certain protections from Saudi Arabian employment law, including the requirement that termination be for a "valid reason." 871 F.2d at 1417. However, because of an express Texas choice-of-law provision, the Ninth Circuit held Texas law to be the decisional law for determining the wrongful termination claim. *Id.* Although Texas, like California, is an at-will employment state, the defendant employer was not permitted to treat the plaintiff as a purely at-will employee under Texas law. To the contrary, Texas law needed to be applied *in view of* the plaintiff's *existing set* of contractual rights. Accordingly, the Ninth Circuit affirmed that the Saudi employment rights "supplanted language in the contract [otherwise] calling for [pure] at-will termination." *Id.* As the court held, the correct analysis was to "apply Texas law to a contract incorporating protections against discharge ...borrowed from Saudi law." *Id.*

In keeping with the valid approach it adopted in *McGhee*, here the Ninth Circuit was similarly required to apply California law to Falotti's Swiss law rights that were incorporated into the parties' employment agreement, and that supplanted Oracle's entitlement to terminate Falotti on a purely at-will basis.

III. The Ninth Circuit's Violations Of This Court's Well-Established Choice-Of-Law And International Comity Principles Constitute Reversible Error Because They Were Outcome-Determinative Of The Proceedings Below

In validating the determination by Oracle's Compensation Committee that Falotti "ceased to be employed" on May 31, 2000, the Ninth Circuit's analysis was directly premised upon its violations of this Court's well-established choice-of-law and international comity principles. Indeed, only by declining to enforce Falotti's Swiss law contractual rights in contravention of the international comity doctrine could the Ninth Circuit treat Falotti as a purely at-will employee in California. In turn, only by treating Falotti as a purely at-will employee bereft of contractual rights could the Ninth Circuit hold that the Committee had acted properly under California law in finding that Falotti "ceased to be employed" at the time Ellison wrongfully purported to terminate him "effective immediately."

Absent these legal errors, the outcome below would have been different.[18] Indeed, under the proper analysis required by this Court's choice-of-law and international comity teachings, California law governing the stock option plan needed to be applied *in view of* Falotti's *existing set* of contractual rights. This would have produced a contrary result because under California law, an employee like Falotti who has enforceable contractual rights to termination notice or

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[18] This proposition should come as no surprise because, as this Court has previously recognized, there are fundamentally different legal implications for *purely* at-will employment agreements as opposed to at-will employment agreements *modified by* the right to a termination notice period. *See, e.g., National Labor Relations Brd. v. Town & Country Electric, Inc.*, 516 U.S. 85, 97 (1995).

"forbidden" periods does not, and cannot, "cease to be employed" until *after* those periods have fully elapsed. As such, in the absence of any special definition for the "ceased to be employed" language having been provided in the stock option plan, the Compensation Committee abused its discretionary authority by defining that language for Falotti in a manner directly contrary to its ordinary meaning under California law.[19]

California law holds that where an employee has an at-will employment agreement *modified by* the rights to receive termination notice or illness protection periods, the employment relationship continues intact until after those contractual periods have run their course. Indeed, in *Romano v. Rockwell Internat. Inc.*, the California Supreme sharply distinguished between the "date of actual termination" which occurs only at the end of a notice period, and the "date of initial notification of termination" which precedes a notice period. 14 Cal. 4th 479, 495 (1996). As the *Romano* court explained, "actual termination of employment" does not happen until the end of a notice period when there is "a complete severance of the relationship of the employer and the employee -- rather than from [initial] notification of termination." *Id.* Precisely the same understanding has been embraced by this Court as well. *See, e.g., Chardon v. Fernandez*, 454 U.S. 6, 8-9 (1981)(a "continuity of employment" exists during

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[19] Previous Ninth Circuit decisions have clearly established that where, as here, a term is *not* specially defined in a stock option plan, the parties' justified expectations can be upheld only by giving that term its ordinary meaning under governing law. *See, e.g., Scribner v. Worldcom, Inc.*, 249 F.3d 902, 908 (9th Cir. 2001) (awarding stock option damages to employee after looking to Washington state case law for ordinary meaning of language appearing in stock option plan). *Cf. Estate Of Heard v. Most Worshipful Grand Lodge Of Free And Accepted Masons*, 49 Cal. 2d 514, 521 (1957)("words in a private instrument should ordinarily, in the absence of a showing of contrary intent, be given the effect given them by the statutory or case law.").

a contractual termination notice period such that the "actual ending of employment" does not occur until the notice period is completed); *Delaware State College v. Ricks*, 449 U.S. 250, 257-59 (1980)(same).

Where, as here, an employer chooses to breach a contractual notice provision by purporting to terminate an employment agreement "effective immediately," the general rule in California and throughout American jurisprudence is as follows:

> ...where an employment or agency contract provides for its termination upon proper notice by one of the parties, an attempt to terminate upon shorter notice will ordinarily be given effect [only] at the end of the proper notice period...

Effect Of Attempt To Terminate Employment Or Agency Contract Upon Shorter Notice Than That Stipulated In The Contract, 96 A.L.R. 2d 272 (2001 ed.)(*citing* extensive case law). Applying this general rule in *Lyon v. Pollard*, this Court held that where an employee had an at-will employment relationship *modified by* a contractual right to a 30-day termination notice period, the employee's termination could not become effective until after that notice period had fully elapsed. 87 U.S. 403, 407 (1874).[20]

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[20] Notably, Falotti had an even stronger contractual position than the employee in *Lyon* because of his additional rights to a "forbidden" period protecting him against termination even when physically incapacitated from performing services by reason of illness. (*See, supra*, p. 4). There is every reason to believe that California courts would honor contractually-based "forbidden" period rights. *Cf. Forzley v. AVCO Corp.*, 826 F.2d 974 (11th Cir. 1987)(employer avoids liability only by observing a 90-day Saudi "forbidden" period incorporated in the employment agreement); *Tavormina v. Timmeny*, 561 S.2d 681 (Fla. App. 1990) (contractual illness protections must be honored); *Red Cross Mfg. Co. v. Stroup*, 79 Ind. App. 532, 135 N.E. 351 (1922) (same).

Given this general rule, California courts have routinely awarded damages to terminees corresponding to what they hypothetically *would have earned* had their contractual notice periods been honored rather than breached. *See, e.g., Martin v. U-Haul Of Fresno*, 204 Cal. App. 3d 396, 402-03 (1988) (awarding notice period damages under a U-Haul dealership contract); *Jewell v. Colonial Theater Co.*, 12 Cal. App. 681, 683 (1910) (awarding notice period damages to an actress under her employment agreement). Here, had Oracle honored Falotti's termination notice and "forbidden" periods by recognizing Falotti's contractual and legal rights to have his employment relationship continue in full and effect, Falotti would have earned the stock options scheduled to vest between May 31, 2000 and September 30, 2000.

Operating under the legal fiction that Falotti was a *purely at-will employee* in California, the Ninth Circuit concluded below that Falotti necessarily "ceased to be employed" at the time he "stopped providing services to Oracle on May 31, 2000." (*See, supra*, pp. 11-12). But, for at least two reasons, pursuant to a proper analysis in which Falotti's contractual employment rights are instead respected and enforced, the fact that Oracle requested that Falotti stop performing services is legally irrelevant to whether he continued to be employed during his contractual termination notice and "forbidden" periods.

First, the substantive scope of Swiss notice period rights is such that an employee retains his full employment status *irrespective* of whether the employer releases him from further performance obligations during a notice period. (*See, supra*, pp. 3-4)(*citing G. v. P. SA*, ATF 118 II 140 (Swiss Supreme Crt. May 20, 1992)).

Second, as this Court again confirmed just two months ago, at "common law the relevant factors defining the master-servant relationship focus on the master's control over the servant... and the common-law element of control is the principal guidepost" for determining whether an employment relationship exists. *Clackamas Gastroenterology Associates PC. v. Wells*, 123 S. Ct. 1673, 1679 (2003). These principles are embraced in California, where the "principal test of an employment relationship is whether the person to whom service is rendered has the right to control" performance. *Tieberg v. Unemployment Ins. Appeals Brd.*, 2 Cal. 3d 943, 946 (1970). Here, it is undisputed that Falotti was contractually obligated to continue providing all requested services to Oracle throughout his termination notice period, and thus that Oracle had the ongoing right to control him. (*See, supra*, pp. 3-4 & fn. 1)(*citing* Swiss law authorities). Accordingly, under California law, Falotti continued to be employed throughout his termination notice period while he remained fully subject to Oracle's control.

That Oracle chose not to exercise its right of control by actually demanding performance did not deprive Falotti of his employment status. "It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The [mere] existence of the right of control and supervision establishes the existence of an agency relationship." *Malloy v. Fong*, 37 Cal. 2d 356, 370 (1951).[21] In any event, Falotti was in the unique position of also having a "forbidden" period which in substance was a contractual right to continued employment even when he was physically incapacitated from performing services. (*See, supra*, p. 4).

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[21] *Cf. Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323 (1992)(common law employment status is established by the mere "right to control" performance); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 325-26 (1974)(same).

As the Ninth Circuit failed to acknowledge or appreciate, California courts have already applied these principles to a fact pattern remarkably similar to the case at bar. *See Bertero v. National General Corp.*, 254 Cal. App. 2d 126 (1967). In *Bertero*, as here, the condition precedent for the plaintiff employee's right to stock options was his continuing "status as an employee". *Id.* at 132-34. When the defendant employer provided plaintiff with initial notice of termination, it informed him that "the company shall not call upon you to perform any [further] services" for the remaining term of the employment agreement. *Id.* at 131. Later, defendant tried to argue that plaintiff had *ceased to be employed* for stock option purposes at the time it had released him from additional service obligations. *Id.* at 134. But the *Bertero* court concluded as a matter of California law that "any failure or refusal by...[defendant] to call upon ...[plaintiff] for services does not 'affect his rights and status as an employee' under the contract and [the stock] options." *Id.* at 131.

Thus, at the end of the day, the Ninth Circuit erroneously ceded to Oracle's Compensation Committee the discretion to find that Falotti "ceased to be employed" at a time when, as a matter of governing California law and contractual right, he in fact had *not* "ceased to be employed."

CONCLUSION

For the foregoing reasons, including the advisability of resolving important choice-of-law and international comity issues, Falotti respectfully requests that this Court grant his present petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORACLE CORPORATION, a Delaware corporation, *Plaintiff-Appellee,*	No. 01-17316 D.C. No. CV-00-02345-WHA (JCS)
PIER CARLO FALOTTI, an individual, *Defendant-Appellant.*	OPINION

Appeal from the United States District Court
for the Northern District of California
William H. Alsup, District Judge, Presiding

Argued and Submitted
December 5, 2002—San Francisco, California

Filed February 11, 2003

Before: Marsha S. Berzon, Richard C. Tallman, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Tallman

[1885]

[1888]

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[1889]

OPINION

TALLMAN, Circuit Judge:

Oracle Corporation terminated Pier Carlo Falotti, a former senior executive based in Switzerland, in May 2000. In the four months following his termination, Falotti was scheduled to vest his remaining stock options worth more than 85 million U.S. dollars. Oracle brought this action seeking a declaration that Falotti is neither entitled to vest these stock options nor to receive their value as damages. Falotti resisted and brought various counterclaims against Oracle. The district court ruled in favor of Oracle on cross-motions for summary judgment.

We have jurisdiction and affirm.

I.

A

Falotti had worked in Geneva, Switzerland, since 1973. In 1995, Oracle contacted Falotti—who at the time was an executive with AT&T—about a job offer. Nothing arose from this initial contact, but talks resumed in 1996. Falotti eventually signed an offer letter from Oracle on July 10, 1996 ("July 1996 Letter Agreement").

Under the July 1996 Letter Agreement, Falotti agreed to work from Geneva as Oracle's Senior Vice President for Europe, the Middle East, and Africa.[1] With incentives, he earned one million U.S. dollars a year in salary. He was also **[1890]** promised that if he remained continuously employed, Oracle would grant him an option, over time and in specified periodic installments, to purchase an initial 600,000 shares of Oracle common stock. The July 1996 Letter Agreement also stated that following Falotti's acceptance, Oracle and Falotti would enter into an employment contract subject to Swiss law.

The July 1996 Letter Agreement was for an indefinite term, and Oracle could terminate Falotti with or without cause. Termination without cause, however, entitled Falotti to a severance package of one million dollars and accelerated vesting of 50% of the stock options described in the July 1996 Letter Agreement.

On August 29, 1996, Oracle and Falotti signed another letter agreement ("August 1996 Letter Agreement"). This agreement stated that Falotti's employment would be governed by the laws of Switzerland. The August 1996 Letter Agreement also said that Falotti's employment with Oracle "shall be subject to the terms of the attached Employee Agreement." Falotti signed the referenced Swiss law Employment Agreement.

A few days later, on September 10, 1996, Oracle and Falotti consummated another letter agreement

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[1] Though technically Falotti worked for Oracle Switzerland a subsidiary of Oracle Corporation, he reported to no one at Oracle Switzerland and instead reported directly to senior management at Oracle Corporation in California. Because it does not affect the analysis—save for one issue discussed in Section IV.C—this opinion will refer to both Oracle Switzerland and Oracle Corporation as "Oracle."

("September 1996 Letter Agreement"). The September 1996 Letter Agreement states that if there is a conflict between the July 1996 Letter Agreement and Swiss law, the July 1996 Letter Agreement would control. The September 1996 Letter Agreement also states that "any notice payable for termination without cause payable under your Swiss Employment Agreement[2] shall be waived providing the payment due under the [July 1996 Letter Agreement] shall have been paid."

[1891]

None of these later three agreements—the August 1996 Letter Agreement, the, Employment Agreement, or the September 1996 Letter Agreement—make any reference to stock options.

During Falotti's employment, all stock-option grants were governed by Oracle's 1991 Long-Term Equity Incentive Plan. Oracle made individual grants under a Grant Agreement, and employees exercised their rights under an Exercise Notice Agreement. The Exercise Notice Agreement contains a California choice-of-law provision. Additionally, all three agreements—the Grant and Exercise Agreements as well as the Equity Incentive Plan (collectively the "Stock Option Agreement")—incorporate each other by reference.

The Stock Option Agreement states that an employee is not entitled to vest any remaining stock options once they "cease[ ] to be employed." Any dispute regarding the interpretation of a grant is reviewed by Oracle's Compensation Committee. The Compensation Committee's decision is binding on both Oracle and the employee.

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[2] The phrase "notice payable" refers to Swiss law, which requires employers to pay employees for a certain period, i.e. a "notice period," after the employee is notified that they will be terminated.

In addition to the initial 600,000 shares due Falotti under the July 1996 Letter Agreement, Oracle issued Falotti more individual stock-option grants during the course of his employment. These grants were made periodically at the discretion of Oracle, and were governed by the Stock Option Agreement. Of significance here, between June 1, 2000, and September 30, 2000—the dates during which Falotti alleges he is entitled to vesting—Falotti was scheduled to vest another two million shares.

While Falotti was traveling to Italy on May 31, 2000, an Oracle human-resources representative called Falotti and informed him, on authority from Oracle CEO Larry Ellison, that Falotti was terminated immediately. Falotti called Ellison that night, and Ellison confirmed Falotti's termination. Falotti informed Ellison during this conversation that under Swiss **[1892]** law Falotti could not be fired because he was ill and unable to work. After May 31st, Falotti was neither paid a salary by Oracle nor, was he given any further stock options. Thereafter, Falotti performed no services for Oracle.

On June 30, 2000, Oracle's Compensation Committee held a special meeting to determine when Falotti "ceased to be employed" for purposes of his stock-option grants. Outside counsel Theodore Rhodes attended the Compensation Committee meeting. Rhodes advised that the Compensation Committee had broad discretion under the Equity Incentive Plan to determine when an employee ceased to be employed and thus became ineligible to vest stock options. Rhodes also advised that the Compensation Committee should make its decision according to the Equity Incentive Plan regardless of Swiss employment law. The Compensation Committee unanimously decided that Falotti ceased to be employed on May 31, 2000, and could not exercise any stock options after that date.

B

Three days after the Compensation Committee's meeting, Oracle filed a complaint in the United States District Court for the Northern District of California. The complaint sought declaratory relief regarding Oracle's rights and obligations under the various contracts with Falotti. Specifically, Oracle sought a declaration that Falotti could not exercise stock options that vested after May 31, 2000, and that he was not entitled to any stock-option damages in lieu of the unexercised options.

Falotti asserted eleven counterclaims. The district court dismissed some of the counterclaims, sparing only counterclaims for benefits under Swiss law, declaratory judgment, breach of written and oral contract, and promissory estoppel.

Oracle then moved for summary judgment on (1) its claim for declaratory relief, (2) Falotti's Swiss law claims to the **[1893]** extent they sought stock options or their equivalent value as damages, and (3) Falotti's oral contract and promissory estoppel claims. Falotti in turn sought summary judgment on his claim that he was entitled to vest stock options between May 31, 2000, and September 30, 2000. The district court granted summary judgment for Oracle and denied summary judgment for Falotti.[3] *Oracle Corp. v. Falotti*, 187 F. Supp. 2d. 1184, 1186 (N.D. Cal. 2001).[4]

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[3] To perfect his appeal, Falotti dismissed his remaining Swiss law claims for salary and benefits. The parties agreed, however, that Falotti could continue to pursue these claims in Switzerland.

[4] We affirm the district court's grant of summary judgment to Oracle on Falotti's promissory estoppel and oral contract claims. *See Falotti*, 187 F. Supp. 2d. at 1205-07. We adopt the district court's reasoning regarding Falotti's promissory estoppel claim. *See id.* at 1206-07. We also hold that the oral contract alleged by Falotti does not meet California's statute of frauds. Even if

II

We review grants of summary judgment de novo. *Amdahl Corp. v. Profit Freight Sys., Inc.*, 65 F.3d 144, 146 (9th Cir. 1995).

Before an employee can be terminated, Swiss law accords employees a notice period during which the employee is entitled to wages and benefits. Swiss Code of Obligations ("SCO") 335c. For an employee who has been with employer for between two and nine years, the notice period is two months. *Id.* Additionally, Swiss law prohibits the termination of an employee while that employee is unable to work. SCO 336c.

The district court held that the severance provision in the **[1894]** July 1996 Letter Agreement precluded Falotti from receiving stock options or stock-option damages. *Falotti*, 187 F. Supp. 2d at 1193. The district court reasoned that because the September 1996 Letter Agreement stated that the July 1996 Letter Agreement trumped the Swiss law Employment Agreement in the case of a conflict, the severance clause in the July 1996 Letter Agreement was the only entitlement remaining after May 31, 2000. *Id.*

The district court's analysis on this point is flawed because Falotti is not seeking stock options as part of a severance, but instead as part of damages incurred while he was still employed by Oracle under Swiss law. In other words, under Swiss law and thus the Employment Agreement, Falotti was not terminated until after the end of the applicable notice periods.

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the May and April email messages are viewed collectively, *see Addiego v. Hill*, 73 Cal. Rptr. 901, 905-06 (Cal. Ct. App. 1968), the May email is too attenuated from Falotti's April email to form an affirmation—as required by the statute to enforce the promise—and there is no mention of compensation.

See SCO 335c (describing termination as occurring *after* a notice period); SCO 336c (prohibiting termination *while* a person is incapacitated); SCO 339b (stating that in certain circumstances severance must be paid *after* termination). Only after termination did the severance benefit accrue.

Furthermore, because the severance provision only applies after termination, there is no conflict between the severance provision and the notice periods that would cause the severance agreement to trump Swiss law as incorporated into the Employment Agreement. Oracle's attempt to label the severance provision as explicitly replacing the notice period is unpersuasive. By its terms, the waiver clause in the September 1996 Letter Agreement was only applicable if Oracle paid Falotti severance. Oracle did not pay the severance, and thus Falotti's notice-period rights remain intact. The severance provision was not an automatic waiver of notice-period rights, but a conditional one. Since Oracle did not meet the condition precedent for waiver, which was payment, Falotti maintained his rights under Swiss law. The district court therefore erred by ruling that the severance provision automatically foreclosed any stock options during the notice periods.

[1895]

III

Whether Falotti is entitled to vest stock options or to stock-option damages is the crux of the case. Oracle seeks a declaratory judgment that it had no obligation to allow Falotti to vest any stock options after May 31, 2000. Falotti argues that certain provisions of Swiss law provide an employee damages—including stock options—if an employer does not honor the applicable Swiss law notice periods. We need not resolve this question of Swiss law, for even if Falotti is correct, it does not follow that

he is entitled to stock options or stock-option damages.

The Swiss law Employment Agreement does not mention stock options. The Stock Option Agreement contains a choice-of-law clause choosing California law and contains integration clauses. The Stock Option Agreement also grants exclusive authority to the Compensation Committee to determine when an employee ceases to be employed and thus when stock options will no longer vest. The parties do not dispute that Falotti stopped performing services for Oracle on May 31, 2000. Relying on the Stock Option Agreement, the Compensation Committee found that Falotti had no right to stock options after May 31, 2000.

[1] Swiss law entitles Falotti only to "what he would have earned" during a notice period. SCO 337c. Falotti presumes that if Oracle had honored the Swiss law notice periods he would have earned the additional vesting of stock options. But this is not true. Even if Oracle had honored the Swiss law notice provisions by paying Falotti's salary and benefits under his Employment Agreement, the Compensation Committee's decision would have been the same because the Committee did not rely on whether the notice provisions applied. Falotti stopped providing services to Oracle on May 31, 2000—even if an employment relationship still existed for Swiss law notice-period purposes—and according to the Compensation **[1896]** Committee this qualified as "ceasing to be employed" under the Stock Option Agreement regardless of Swiss law.

[2] Furthermore, according to Falotti's own Swiss law expert, the Swiss law notice provisions did not entitle Falotti to reinstatement, but only to payment of wages and benefits. Honoring the notice periods would not, therefore, have compelled a different finding by the Compensation Committee because the

Committee based its decision on the date when Falotti stopped performing services for Oracle.

[3] The Stock Option Agreement is independent of the Employment Agreement. On its face it is offered as a separate incentive to employees. Additionally, honoring the Stock Option Agreement's choice-of-law clause comports with both the law of this Court and Swiss law. *See, e.g., Northrop* Corp. *v. Triad Int'l Mktg., S.A.*, 811 F.2d 1265, 1270 (9th Cir. 1987), *amended on other grounds*, 842 F.2d 1154 (9th Cir. 1988) (noting the importance of choice-of-law provisions in international agreements). Conversely, a holding by this Court ignoring the choice-of-law clause in favor of Swiss law would improperly assimilate this Stock Option Agreement into every Oracle employment contract governed by local laws. This result would severely hamper an employer's ability to maintain uniform stock-option plans for employees residing in different jurisdictions around the world.

Because the reasons for the Compensation Committee's decision—the fact that Falotti no longer performed services for Oracle—remain constant regardless of whether Falotti was paid wages and benefits in accordance with Swiss law, Falotti would not have earned the stock options once he no longer performed services for Oracle. The district court properly declared that Falotti was neither entitled to stock options nor stock-option damages.

[1897]

IV

Falotti attempts to circumvent this result by asserting that the Compensation Committee breached its covenant of good faith and fair dealing under the Stock Option Agreement.

Under California law, both parties to a contract owe duties of good faith and fair dealing. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 389 (Cal. 1988). These duties prevent one party from frustrating the other party's right to receive benefits from a contract between the parties. Guz *v. Bechtel Nat'l, Inc.*, 8 P.3d 1089, 1110 (Cal. 2000).

California courts have explained how this covenant applies when a contract affords one party discretion:

> [C]ourts are not at liberty to imply a covenant directly at odds with a. contract's express grant of discretionary power except in those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in unenforceable, illusory agreement. In all other situations where the contract is unambiguous, the express language is to govern, and [n]o obligation can be implied ... which would result in the obliteration of a right expressly given under a written contract.

Third Story Music, Inc. v. Waits, 48 Cal. Rptr. 2d 747, 753 (Cal. Ct. App. 1995) (internal quotation marks omitted).

Falotti offers seven arguments in support of his contention that the Compensation Committee breached its duty of good faith and fair dealing. We address each in turn.

A

Falotti asserts that Oracle violated California's "prevention doctrine" by improperly terminating Falotti and thus prevent- **[1898]** ing him from exercising stock options. Falotti argues that he had a right to stock options, that his termination was

"illegal," and thus that California law applies to prevent Oracle from prohibiting the vesting of the options.

This logic is unpersuasive. Falotti conflates "employment" under Swiss law with "ceased to be employed" under the Stock Option Agreement governed by the discretion of the Compensation Committee. Though Oracle may have violated Swiss law by not honoring the notice periods, and thus Falotti would be , entitled to continued "employment status" under Swiss law, that does not mean that the Compensation Committee was bound by the legal effect of Swiss law when determining whether Falotti was "employed" for purposes of the Stock Option Agreement.

Oracle bargained for its right to retain discretion under the Stock Option Agreement. Oracle properly exercised that right, taking into account that Falotti no longer performed any services for Oracle and thus did not meet the incentive rationale contemplated by the Stock Option Agreement, to determine when Falotti ceased to be employed for Stock Option Agreement Purposes. *Id.* at 753; *see also Camp v. Jeffer, Mangels, Butter & Mannaro*, 41 Cal. Rptr. 2d 329, 335 Cal. Ct. App. 1995) ("where the at-will employment relationship is terminated, the employee cannot complain about a deprivation of the benefits of continued employment, for the agreement never provided for a continuance of its benefits in the first instance." (citation omitted)).

B

Falotti argues that since the Employment Agreement stated that his "employment" would be "governed by the laws of Switzerland," it was improper for the Compensation Committee not to consider Swiss law. But there is little doubt from the record

that the Stock Option Agreement—choosing California law and granting discretion to the Compensation **[1899]** Committee—is an independent and integrated contract apart from any employment, agreement. *See Northrop*, 811 F.2d at 1270 ("choice-of-law and choice-of-forum provisions in international commercial contracts are an almost 'indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction, and should be enforced absent strong reasons to set them aside." (internal quotation marks omitted)).

C

Falotti argues that the Compensation Committee violated Cal. Civ. Code § 1642, which states that "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." There are many reasons that this section does not apply to the Stock Option Agreement and Employment Agreement. The contracts were executed at different times; concern different topics; are between Falotti and two different parties (Oracle Corporation is the party to the Stock Option Agreement but Oracle Switzerland is the party to the Employment Agreement, *see* supra note 1); contain incompatible choice-of-law terms; contain integration clauses; are not dependent on one another; and only the July 1996 Letter Agreement mentions stock options to any extent. *See Signal Cos. v. Harbor Ins. Co.*, 612 P.2d 889, 896 (Cal. 1980) (refusing to read contracts together where the parties are different, the contracts are not dependent on one another, and the contracts have different execution dates).

D

Falotti asserts that even under California law he was entitled to a notice period that the Compensation

Committee disregarded. This position has little merit. *See* Cal. Lab. Code § 2922 ("An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for **[1900]** a period greater than one month."); *Guz*, 8 P.3d. at 1100 ("An at-will employment may be ended by either party at any time without cause, for any or no reason, and subject to no procedure except the statutory requirement of notice." (internal quotation marks omitted)). It is undisputed that Oracle provided Falotti with notice of his termination on May 31, 2000.

E

Falotti maintains that the Compensation Committee's decision runs contrary to the principles articulated in *Scribner v. WorldCom, Inc.*, 249 F.3d 902, 905 (9th Cir. 2001). In *Scribner,* the plaintiff-employee was entitled to immediately exercise certain stock options if he was terminated "without cause." A committee, appointed by the employer, possessed the discretion to interpret the applicable stock-option plan. *Id.* at 906. Despite the fact that the employee was terminated as part of a sale of assets, and not because of performance, the committee determined that the employee had been terminated for cause. *Id.*

Reversing the grant of summary judgment to the employer, we held that the committee had discretion to interpret the stock-option plan but not to redefine the plan beyond the plain meaning of its terms. *Id.* at 911-12. Falotti argues that the same rationale applies here, as the Compensation Committee did not have the discretion to redefine "ceases to be employed" in violation of Swiss law. But Falotti's logic ignores the distinction the *Scribner* court made between "interpretation" and "redefinition." In *Scribner,* the committee's interpretation of "without cause" was so far afield from its plain meaning that it amounted to

redefinition. Here, on the other hand, the Compensation Committee's determination that Falotti ceased to be employed once he stopped working for Oracle does not invoke the same concerns because the Committee's determination that "employed" means performing services for Oracle does not redefine "employed" beyond its meaning.

[1901]

In the current context, the word "employ" may reasonably be interpreted to exclude someone who is no longer acting for or being put to work by the company. The first definition of "employ" provided in *Webster's Third New International Dictionary (Unabridged)* 743 (1971) is "to make use of" *Black's Law Dictionary* 543 (7th ed. 1999) offers exactly the same phrase as its first definition of "employ." Since Oracle ceased to make use of Falotti's services after May 31, 2000, the Compensation Committee's determination that he "ceased to be employed" by Oracle after that date was a reasonable application of the meaning of the word. *See also United States v. Am. Trucking Ass'ns.*, 310 U.S. 534, 545 (1940) ("The word ['employee'] is not a word of art. It takes color from its surroundings and frequently is carefully defined by the statute where it appears.").

F

Falotti asserts that the Compensation Committee's decision was "contrary to the facts." Falotti alleges that the "fact" ignored by the Compensation Committee was that the Employment Agreement was governed by Swiss law and thus that he was entitled to notice periods under Swiss law. For the reasons already articulated, this argument is unavailing.

G

Falotti maintains that the Compensation Committee treated him differently from other senior-level executives in Europe, a distinction which evinces bad faith. Falotti specifically compares his case to another senior executive with Oracle in Switzerland, Frank Moellhoff. The Compensation Committee's treatment of Moellhoff does not implicate a lack of good faith.

Moellhoff was terminated but allowed, as a courtesy, to vest stock options for one month after his termination. When Moellhoff demanded that he be allowed to vest stock options **[1902]** for two months in accordance with the Swiss law notice period, the Compensation Committee refused. The Committee decided that Moellhoff ceased to be employed when he stopped performing services for the company.

Falotti asserts that the treatment of Moellhoff shows that the Compensation Committee breached its covenant of good faith and fair dealing when it considered Falotti's case. But Falotti misunderstands the nature of the decision regarding Moellhoff. Nothing in the record indicates that the Compensation Committee granted Moellhoff an extra month of vesting because it felt that Swiss law should apply. It suggests the opposite. Indeed, had the Committee considered Swiss law, a two-month—not a one-month—period would have been applicable. Instead, the decision regarding Moellhoff was a discretionary choice to provide Moellhoff with one extra month of vesting as a courtesy.

When the Compensation Committee was faced with the decision of when Moellhoff ceased to be employed for purposes of the Stock Option Agreement, the minutes of its meeting specifically indicate that "the Committee members unanimously decided that Mr.

Moellhoff ceased to be employed for purposes of the [Equity Incentive] Plan when *he ceased to perform services for the Company.*" (emphasis added). The issue before the Committee was identical to the one it faced with Falotti: when does an employee "cease to be employed." The results were the same in both cases. This does not suggest bad faith.

V

[4] Because Falotti's Stock Option Agreement was not controlled by Swiss law and afforded Oracle's Compensation Committee sole discretion to interpret the Agreement, we affirm the district court's declaration that Falotti has no rights to stock options or stock-option damages. We also affirm the district court's decision granting summary judgment to Oracle **[1903]** on Falotti's promissory estoppel and oral contract claims. Each party shall bear its own costs.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ORACLE CORPORATION, a Delaware corporation,
Plaintiff,

v.

PIER C. FALOTTI, an individual,
Defendant.

No. C 00-02345 WHA

ORDER GRANTING PLAINTIFF ORACLE CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT; DENYING DEFENDANT PIER C. FALOTTI'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

In this employment case involving both Swiss and California law, this order **GRANTS** plaintiff's motion for partial summary judgment and **DENIES** defendant's cross-motion for partial summary judgment.

STATEMENT

Plaintiff Oracle Corporation seeks a declaratory judgment that it does not owe any unvested stock options to defendant Pier Carlo Falotti, a former high-level executive, who Oracle terminated. Mr. Falotti claims that he is entitled to unvested stock options (or their value) for breach of his employment contract or Oracle's stock-option plan. Both parties have filed cross-motions for partial summary judgment on the

issue of entitlement to stock options, although Mr. Falotti seeks only to establish his right to options vesting no later than September of 2000, three months after Oracle told him he was terminated. Oracle also seeks summary judgment on Mr. Falotti's oral-contract and promissory-estoppel counterclaims under California law.

In 1996, Mr. Falotti was hired as Senior Vice President of EMEA, an unincorporated business division of Oracle Corporation, encompassing Oracle's European, Middle Eastern and African operations. Subsequently, he was promoted to Executive Vice President of EMEA and made a member of Oracle's Executive Committee. At the outset of his employment, he and Oracle entered into the contracts that provide the basis for this dispute: an employment contract governed by Swiss law, and a stock-option agreement controlled by California law.

Oracle notified Mr. Falotti of his termination on May 31, 2000. Subsequently, the committee that administered Oracle's stock-option plan determined that Mr. Falotti was not entitled to any stock options vesting after that date. In this action, Mr. Falotti argues that he was entitled to stock options vesting between June and September of 2000 (or their value) for two main reasons. First, he contends that Oracle's stock-option committee abused its discretion by determining that he was terminated on May 31, 2000, when under Swiss law, he should have been considered to be employed by Oracle until September 30. Second, he maintains that he was entitled to the value of the stock options vesting between June and September of 2000 as damages for the breach of his employment contract.

This order holds that Mr. Falotti is not entitled either to the unvested stock options or to their value. Mr. Falotti agreed up front as to what stock options he would receive upon termination before vesting. That agreement is dispositive to his stock-option claim. As an independent and alternative ground, the

various stock-option grants conferred on Oracle's stock-option committee the authority to determine when Mr. Falotti ceased to be a "full-time employee." The record does not show that the committee abused its discretion in ruling against Mr. Falotti. Other points of contention will be discussed below.

The Employment Contract

Mr. Falotti began to negotiate his employment contract with Oracle in April of 1996 (Falotti Decl., dated Sept. 21, 2000, ¶ 6). On May 21, 1996, Oracle sent him an offer letter, **[2]** which he declined to accept (*ibid.*). Oracle sent him a new offer letter on July 2, 1996, which he accepted and signed on July 10, 1996, a key exhibit herein.

The letter agreement gave Mr. Falotti the position of Senior Vice President of Europe, Middle East and Africa. It stated that Mr. Falotti would receive a base salary with incentives, and that (Henschke Decl., Exh. 1, at 2):

> Following your acceptance of this offer by Oracle, we will agree on an employment contract that will be subject to Swiss law. The terms of the contract will include: (1) the start date of your employment, (2) your accrual of vacation at the rate of twenty days per year, (3) the provision by Oracle to you of benefits (including pension) tailored to your needs at a cost not to exceed 20% of your on-target earnings, and (4) during your employment, the leasing for your use of a car equivalent to the BMW 750iL.

The letter agreement also discussed stock options. It stated: "We will submit to the Board of Directors on July 15, 1996, a request to approve a grant to you of an option to purchase 600,000 shares. . . . The option will be issued under a written agreement and will be

subject to qualification under all applicable securities regulations" (*id.* at 1).

The letter agreement further provided (*id.* at 1-2):

> If you remain continuously employed by Oracle, you will be eligible to exercise your right to purchase the 600,000 option shares granted herein according to the following vesting schedule:
>
> at six months from your starting date: 25%
>
> at 18 months from your starting date: 50%
>
> at 36 months from your starting date: 75%
>
> at 48 months from your starting date: 100%
>
> Stock option grants shall be provided from time to time as the board approves in its discretion commensurate with its evaluation of your contribution and responsibilities an the financial health of the company.

The letter also promised the following severance package, which had not been included in Oracle's original offer letter (*id.* at 2) (emphasis added):[1]

> Further, the contract shall provide that if Oracle terminates your employment without cause Oracle will provide you total severance as follows: (1) payment of one year's on-target **[3]** earnings as set forth herein ($ 1,000,000), payable in twelve equal monthly installments, (2) *if such options have not already vested, accelerated vesting of the first 50% of the stock option grant as setforth herein,* and (3) provision to you of health care coverage and

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[1] Compare with Falotti Decl. dated Sept. 21, Exh. A.

> pension payments for one year from your termination date.

As stated, Mr. Falotti countersigned this offer letter on July 10, 1996. As will be shown, this express provision is important in resolving this case.

In addition to the letter agreement, three other documents comprised Mr. Falotti's employment contract. The second document comprising his employment contract was a letter from Lawrence Ellison, Chairman and Chief Executive Officer of Oracle, and Raymond Lane, former President of Oracle, dated August 29, 1996, and signed by Mr. Falotti on September 10, 1996. It provided: "Your employment will be governed by the laws of Switzerland" (Henschke Decl., Exh. 2, at 1). Under "remuneration," it stated Mr. Falotti's annual base and on-target earnings and that an attached employment agreement would govern the terms of his employment *(ibid.)*. Attached to the letter was the third document comprising his employment contract, the employment agreement. It was also signed by Mr. Falotti on September 10, 1996, and related primarily to trade secrets.

The fourth document comprising Mr. Falotti's employment contract was a letter from Mr. Lane, dated September 9, 1996, and signed by Mr. Falotti on September 10, 1996. It stated: "The purpose of this letter is to clarify how the various letters and agreements relate to one another" (Henschke Decl., Exh. 4, at 1). It explained: "the terms of your remuneration outside Switzerland shall be in accordance with the letter dated 2nd July, 1996, from myself and signed by you on 10th July 1996, ('the Letter')" *(ibid.)*. It further provided (*id.* at 2):

> In the event of any dispute between the Swiss law agreement and the Letter, the terms of the Letter shall prevail. . . .

> Furthermore, if Oracle terminates the Employee Agreement without cause the terms of the Letter shall prevail.
>
> You further agree that any notice payable for termination without cause payable under your Swiss Employment Agreement shall be waived providing the payment due under the Letter shall have been paid.

[4]

The Stock-Option Agreement

Seven documents further addressed stock options. The first was entitled, "Oracle Corporation Non-Qualified Stock Option Grant Agreement," dated September 13, 1996 (Henschke Decl., Exh. 9). It provided, as promised in the offer letter, that Mr. Falotti was to receive 600,000 stock options, broken into four tranches of 150,000 shares each. The first tranche was scheduled to vest on March 13, 1997. The last tranche, the one at issue in this action, was scheduled to vest on September 13, 2000.

Subsequently, Oracle and Mr. Falotti entered into three similar grant agreements for smaller lots of options. The first, dated July 11, 1997, granted Mr. Falotti an additional 25,000 stock options due to vest on July 11 every year thereafter, up until the year 2001. The second, dated July 10, 1998, granted Mr. Falotti an additional 50,000 stock options due to vest on July 10 every year thereafter, up until the year 2002. The third, dated November 20, 1998, granted Mr. Falotti an additional 50,000 stock options due to vest on November 20 every year **[5]** thereafter, up until the year 2002.[2] All four grant agreements were printed on a standard form, which provided that they were "subject to the terms and conditions attached

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[2] Mr. Falotti was also granted other stock options, including options vesting on June 4, 2000, but the agreements for these options are not in the record (Cooper Decl., Exh. 28).

hereto," and "subject to all the terms and conditions of the Company's 1991 Long-Term Equity Incentive Plan as amended to date" *(ibid.)*. All four grant agreements were signed by Mr. Falotti and Bruce Lange, Oracle's Vice President and Corporate Treasurer.

The fifth document, one of the two documents incorporated by reference into the grant agreements signed by Mr. Falotti, was entitled "Oracle 1991 Long-Term Equity Incentive Plan" (Henschke Decl., Exh. 6). It contained questions and answers about the stock-option plan, and contained definitions of some of the terms. It explained that a compensation committee formed of members of Oracle's board of directors would administer the plan (*id.* at F0027). Its description of the stock-option plan was the same as the terms and conditions, which were attached to the grant agreements.

[6] The sixth document, entitled "1991 Long-Term Equity Incentive Plan, Terms and Conditions" was appended to the grant agreements signed by Mr. Falotti and incorporated by reference (Henschke Decl., Exh. 7). It set forth the terms and conditions of the stock-option plan. Section 3 was entitled "Termination of Option." It provided (*id.* at 1):

> Except as provided below in this Section, this Option shall terminate and may not be exercised if Optionee ceases to be employed by the Company or any Parent or Subsidiary or Affiliate of the Company. Optionee shall be considered to be employed by the Company for all purposes under this Section 3 if Optionee is an officer, director or full-time employee of the Company or any Parent, Subsidiary or Affiliate of the Company or if the Board determines that the Optionee is rendering substantial services as a part-time employee, consultant, contractor or advisor to

> the Company or any Parent, Subsidiary or Affiliate of the Company. The Board shall have discretion to determine whether Optionee has ceased to be employed by the Company and the effective date on which such employment terminated.

It further stated (*id.* at 3):

> Any dispute regarding the interpretation of this Grant shall be submitted by Optionee or the Company forthwith to the Board or the committee thereof that administers the Plan, which shall review such dispute at its next regular meeting. The resolution of such a dispute by the Board or committee shall be final and binding on the Company and on Optionee.

The terms and conditions also contained an integration clause, which read (*id.* at 4): "The Plan and Notice and Exercise Agreement attached hereto are incorporated herein by reference. This Grant, the Plan and the Notice and Agreement constitute the entire agreement of the parties and supersede all prior undertakings and agreements with respect to the subject matter hereof."

The seventh document was a form entitled Oracle Corporation Stock Option Exercise Notice and Agreement. Mr. Falotti signed this agreement every time he exercised stock options, most recently on April 5, 2000. The form contained an integration clause and choice-of-law provision, which read: "The Plan and Grant are incorporated herein by reference; this Agreement, the Plan and the Grant constitute my entire agreement with the Company and supersede all prior undertaking and agreements between us with respect to the subject matter hereof; this Agreement is governed by California law except for that body of law

that pertains to conflict of laws" (Cooper Decl., Exh. 9, at 3).

[7] In sum, Mr. Falotti signed grant agreements in September of 1997, July of 1997, July of 1998, and November of 1998. The grant agreements incorporated by reference two separate documents: the 1991 Long-Term Equity Plan, and the 1991 Long-Term Equity Plan Terms and Conditions. Every time Mr. Falotti exercised a stock option, he signed an Exercise and Notice Agreement, which also incorporated by reference the grant agreement, the 1991 Long-Term Equity Plan, and the 1991 Long-Term Equity Plan Terms and Conditions.

Mr. Falotti's Departure

In January of 2000, Mr. Falotti and Mr. Ellison began discussing various plans to have Sergio Giacoletto assume many or all of Mr. Falotti's duties, with Mr. Falotti assisting or training him (Ellison Dep. 154). According to Mr. Falotti, although compensation was not discussed, the two reached an oral agreement, whereby Oracle guaranteed him full-time employment from June 1, 2000, through June 1, 2001 (Falotti Dep. 197). According to Mr. Lane, Mr. Falotti's former boss (Lane Dep. 76-77):

> The plan I had developed with Pier Carlo was to work halfway through the new fiscal year [May 31, 2000 to May 31, 2001], or work half time for the whole year, but that we would name Sergio Giacoletto as the new head of EMEA, and that Pier Carlo would be there to mentor him and to do customer activities and things like that. . . . I didn't think we should pay somebody full time at this rate ... So I told Larry my feelings, that I though he was wrong in this decision, and he said, "Well, that's what we've agreed to." So I called Pier Carlo back and said, "It's a done deal."

Mr. Falotti states that Mr. Ellison subsequently affirmed their agreement in the beginning of April, when he asked Mr. Ellison about it (Falotti Dep. 206-09).

Mr. Ellison, on the other hand, maintains that he was "intentionally ambiguous" with Mr. Falotti and denies reaching any definitive agreement with him (Ellison Dep. 155, 162). According to Mr. Ellison, by January of 2000, he had decided to terminate Mr. Falotti as soon as this could be done without hurting business in Europe (*id.* at 152-54). As of January, however, he had not ruled out the possibility of retaining Mr. Falotti in a different role than Executive Vice President, EMEA, to create a smooth transition in management. In his deposition, Mr. Ellison testified, "I didn't know if we needed Pier Carlo at that point for a year of transition or not. So I was keeping my options open" (*id.* at 154). At some point in time, **[8]** Oracle's attorneys explained that Mr. Falotti could not be given a consulting job, because he would continue to vest in tens of millions of dollars worth of stock options every year (*id.* at 244-45). Thereafter, Oracle began contemplating Mr. Falotti's termination. Several termination letters were drafted, but none was ever sent.

On May 30, 2000, Mr. Falotti sent an email to Mr. Lane, stating: "Here is the announcement I will send out on June 1" (Moore Decl., Exh. H, at 1). The announcement stated that Mr. Falotti had decided to transfer all of his operational responsibilities to Mr. Giacoletto, so that Mr. Falotti could devote all his time to activities such as "helping the Account Management to reach higher levels of decision-makers in our customer base" and strengthening management contacts with our partners" (*id.* at 1-2).

On the same day, Mr. Falotti visited his doctor, Raymond Hadorn, whom he had not seen for almost three years. The appointment was made by his wife, who had contacted Dr. Hadorn the day before, stating that Mr. Falotti was depressed and needed an

appointment quickly. According to Dr. Hadorn, Mr. Falotti slumped in a chair and cried during the visit. Dr. Hadorn diagnosed Mr. Falotti with deep depression, resulting in a total incapacity to work. He gave Mr. Falotti a certificate stating this diagnosis. After leaving the doctor, Mr. Falotti returned to Oracle and worked until 7:30 in the evening. That night, he sent business emails from his home until 10:51 p.m.

Under Swiss law, any attempt to terminate an employee who cannot work due to illness is "null and void." Such incapacity is commonly proven by a medical certificate similar to the one provided by Dr. Hadorn.

Mr. Falotti worked on the morning of May 31, 2000. Later in the day, he returned a phone call from Vance Kearney, Vice President of Human Resources, EMEA. Mr. Kearney told Mr. Falotti that he was being terminated immediately (Kearney Dep. 224). According to Mr. Kearney, Mr. Falotti refused an offer of stock options due to vest in June and July in exchange for his retirement, stating "that's not acceptable, you know, I'll discuss this with Larry" *(ibid.)*. Mr. Falotti then called his attorney and subsequently Mr. Ellison. According to Mr. Falotti, Mr. Ellison told him he was being terminated because he was "too expensive for his **[9]** job" (Falotti Dep. 269). Mr. Ellison refused to honor the prior arrangement to retain Mr. Falotti through the fiscal year of 2001 and would not discuss the matter further, Mr. Falotti states. Mr. Ellison, on the other hand, states that in response to Mr. Ellison's offer of stock options due to vest in June and July (775,000 shares), Mr. Falotti responded that he wanted the stock options due to vest in September (1,350,000 shares) as well as those earlier. According to Mr. Ellison, when he refused the counterproposal, Mr. Falotti said: "You can't terminate me because I'm sick. I've got a headache. You don't work in Switzerland as long as I have without being familiar with Swiss law" (Ellison Dep. 213).

As of May 31, Mr. Falotti was relieved of his duties and performed no active work for Oracle. On May 31, Oracle changed his password and began clearing out his office (Boskin Dep. 154). On June 5, 2000, Mr. Falotti sent Dr. Hadorn's note to Oracle via certified mail. Oracle responded on June 22 with two letters. One stated that Mr. Falotti had been terminated as of May 31. The other read: "In case you persist in alleging that you are sick, you will be invited for a medical examination in due course" (Henschke Decl., Exh. 41). The same day, Mr. Falotti was admitted to La Ligniere hospital. La Ligniere released Mr. Falotti on July 5. Two days later, Mr. Falotti visited Dr. Hadorn, who declared him once again fit to work as of July 10. On July 7, Mr. Falotti's attorney wrote Oracle stating that Mr. Falotti would submit to a medical examination by a mutually-agreeable doctor, but that Mr. Falotti would be on vacation until August 4. No examination was ever performed.

The Determination by the Stock-Option Committee

The committee that administered Oracle's stock-option plan convened a special meeting by telephone on June 30 to determine whether Mr. Falotti was entitled to any stock options vesting after May 31. The committee was comprised of two of Oracle's outside directors: Michael Boskin and Donald Lucas. Also attending were Oracle's general counsel, Daniel Cooperman, and outside counsel from the law firm representing Oracle in the present litigation, Theodore Rhodes. Prior to the meeting, the committee members were provided with an information packet containing: (i) the offer-letter agreement signed by Mr. Falotti on July 10, 1996; (ii) the letter agreement dated August 29, 1996, and the attached employee agreement; **[10]** (iii) the letter dated September 9, 1996, clarifying the relationship between Mr. Falotti's prior employment agreements; (iv) excerpts from the Oracle 1991

Long-Term Equity Incentive Plan; and (v) the letter dated June 22, 1996, from Oracle, stating that Mr. Falotti's termination was effective as of May 31, 2000. The minutes of the committee meeting read in part (Henschke Decl., Exh. 46):

> Mr. Rhodes explained the background of the situation involving Mr. Falotti including the notice of termination, effective immediately, delivered by Mr. Ellison to Mr. Falotti on May 31, 2000, and the subsequent note produced by Mr. Falotti from his doctor indicating that Mr. Falotti was unable to perform his duties as of May 30, one day preceding the date notice was given by Mr. Ellison.
>
> Mr. Rhodes explained that under Swiss law notice of termination may not be effective if given while the employee is unable to work. Mr. Rhodes suggested to the Committee that it needed to interpret whether Mr. Falotti ceased to be employed for purposes of the Plan regardless whether the notice provided was effective under Swiss law. He pointed out that the purpose of the Plan, as set forth in Section 1 of the Plan, is to provide an incentive to eligible employees whose present and potential contributions are important to the success of the Company and to enable the Company to continue to enlist and retain in its employ the best available talent. . . .
>
> Mr. Lucas asked whether there was any additional information that they should know. Mr. Rhodes indicated that based on his investigation, there has never been another interpretation of this provision, so this is an issue of first impression.

> The Committee, after deliberation, unanimously decided that for purposes of the Plan, Mr. Falotti ceased his employment with Oracle on May 31, 2000.

On July 3, 2000, Oracle filed suit herein for a declaration that it does not owe Mr. Falotti any more stock options beyond those vesting on or before May 31, 2000. On September 1, 2000, Mr. Falotti filed suit against Oracle in Swiss labor court, still pending. He also filed counterclaims herein under Swiss and California law. After two motions to dismiss, his remaining counterclaims under California law are for: (i) a declaration that he is entitled to stock options; (ii) breach of contract; and (iii) promissory estoppel. He also contends that Oracle has violated the Swiss Code of Obligations Article 335c, which entities an employee to a two-month notice period before his or her termination becomes effective, and the Swiss Code of **[11]** Summary Obligations Article 336c, which prohibits terminating an employee who cannot work due to illness.

ANALYSIS

Summary judgment must be granted insofar as no genuine issue of material fact exists and no reasonable trier of fact could find other than for the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A party may seek summary judgment on "all or any part" of an action. Fed. R. Civ. P. 26(a). The moving party has the initial burden of production. It may carry this burden in either of two ways: it may offer evidence disproving an element of the plaintiff's case, or it may show the absence of any genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party meets its burden, the nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories and admissions on file, designate

specific facts showing that there is a genuine issue for trial." *Id.* at 323-324 (internal quotations omitted).

I. Severance Agreement

Mr. Falotti has raised a number of arguments regarding the interplay of Swiss law and the stock-option agreement. The dispositive contract in this action, however, is the express severance agreement Mr. Falotti negotiated. Regardless of when Mr. Falotti's termination became effective under Swiss law, he was entitled to the following total severance (Henschke Decl., Exh. 1, at 2) (emphasis added):

> if Oracle terminates your employment without cause Oracle will provide you total severance as follows: (1) payment of one year's on-target earnings as set forth herein ($1,000,000), payable in twelve equal monthly installments, (2) *if such options have not already vested, accelerated vesting of the first 50% of the stock option grant as setforth herein,* and (3) provision to you of health care coverage and pension payments for one year from your termination date.

The letter Mr. Falotti signed on September 10, 1996, stated that to the extent that the provision above conflicted with his employment contract, the provision above controlled and that "if Oracle terminates the Employee Agreement without cause, the terms of the [July 2] letter shall prevail" (Henschke Decl., Exh. 4, at 1-2). Mr. Falotti was terminated without cause. From the plain language of his severance contract, which was specifically negotiated by him, he was **[11]** entitled to the severance stated above. Since he had already received 50% of the stock-option grant discussed in the contract, he was entitled to no other stock options as total severance and no other accelerated vesting. This provision is dispositive for all

the stock options at issue. By its breadth, this provision applied to any and all severance due to Mr. Falotti if he were terminated without cause. Accordingly, this order holds that Mr. Falotti was not entitled to any stock options vesting after May 31, 2000. As a separate and independent ground for this conclusion, this order holds that neither the stock-option agreement, nor his employment contract entitled Mr. Falotti to any stock options vesting after May 31 or to their value, as follows.

II. The Stock-Option Agreement

Stock-option contracts are interpreted under the normal rules of contract interpretation, looking to the specific language of the contract, the facts of the case, and the general contract-interpretation principles of the applicable law. *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 907 (9th Cir. 2001). Entitlement to stock options, the parties argue, turns on the interpretation of the italicized language from the terms and conditions of the stock-option plan:

> Except as provided below in this Section, this Option shall terminate and may not be exercised if Optionee ceases to be employed by the Company or any Parent or Subsidiary or Affiliate of the Company. *Optionee shall be considered to be employed by the Company for all purposes under this Section 3 if Optionee is an officer, director or full-time employee* of the Company or any Parent, Subsidiary or Affiliate of the Company or if the Board determines that the Optionee is rendering substantial services as a part-time employee, consultant, contractor or advisor to the Company or any Parent, Subsidiary or Affiliate of the Company. *The Board shall have discretion to determine whether Optionee has ceased to be employed*

> *by the Company and the effective date on which such employment terminated.*

In one of his central contentions, Mr. Falotti argues that he should have been "considered to be employed by the Company for all purposes of" the stock-option agreement because Swiss law prohibited his termination until September 30. Specifically, Mr. Falotti's employment contract was governed by the Swiss Code of Obligations, which applied to all employment contracts in Switzerland. Two provisions of the Swiss Code of Obligations bore **[13]** on when Mr. Falotti was terminated under Swiss law. First, Article 335c of the Code of Obligations provided:

> The employment relationship may be terminated at the end of a month during the first year of service with a notice period of one month, in the second and up to and including the ninth year of service with a notice period of two months, and thereafter with a notice period of three months.
>
> These periods may be altered by written agreement, standard employment contract or collective employment contract. They shall, however, be reduced to less than one month only by collective employment contract and only for the first year of service.

Second, Article 336c of the Code of Obligations stated in part:

> 1. [T]he employer shall not terminate the employment relationship . . .
>
> > b. during the period that the employee is prevented from performing his work fully or partially by no fault of his own due to illness or accident for 30 days in the first

> year of service, for 90 days as of the second year until and with the fifth year of service, and for 180 days as of the sixth year of service.
>
> 2. Notice given during one of the forbidden periods in paragraph I shall be null and void. If the notice is given prior to the beginning of such period, however, and if the notice has not expired prior to such period, the expiration shall be suspended and shall continue only after termination of the forbidden period.

Mr. Falotti argues that because he could not have been terminated when he was ill from May 30 until July 10, his two-month notice period did not begin running until July 10, when he had recovered. Since an employee cannot be terminated until the end of a month under Swiss law, his employment did not end until September 30, he maintains. Oracle, on the other hand, contends that under California law, which expressly governed the stock-option plan, Mr. Falotti was not a "full-time employee" eligible to vest in stock options after May 31 and that the compensation committee had discretion to determine when Mr. Falotti "ceased to be employed by the company and the effective date on which such employment terminated."

As both sides acknowledge, the stock-option agreement was governed by California law. Under California law, Mr. Falotti was not a full-time employee after May 31, since he was told he was terminated, he was relieved of his duties, his password was changed, his office was **[14]** cleared out, and he performed no active work at all for Oracle. Mr. Falotti, however, maintains that Oracle breached the implied covenant of good faith and fair dealing because the stock-option committee abused its discretion. "The essence of the covenant of good faith

is objectively reasonable conduct." *Badie v. Bank of America*, 67 Cal. App. 4th, 779, 796 (1998) (quotation omitted). It was not an abuse of discretion for the compensation committee to apply California law, since the stock-option agreement required it to do so. Nor was the committee required to consider Swiss law. The choice-of-law provision and integration clauses in the stock-option agreement evidence that the plan was intended to be self contained, to be administered under rules familiar to the members of the committee and to apply similarly to all Oracle employees. See *Northrop Corp. v. Triad Int'l Mktg., S.A.*, 811 F.2d 1265, 1270 (9th Cir. 1987) ("choice-of-law and choice-of-forum provisions in international commercial contracts are an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction, and should be enforced absent strong reasons to set them aside") (quotation omitted). The committee's decision was in keeping with the stated purpose of the stock-option plan, since Mr. Falotti had made no present or potential contributions. to Oracle after May 31, and the purpose of the plan was "to provide an incentive to eligible employees ... whose present and potential contributions are important to the continued success of the Company" (Cooper Decl., Exh. 6, at 1-2).

Thus, the committee's conclusion as to when Mr. Falotti ceased to be employed for purposes of the stock-option plan is a second and dispositive basis for denying him any stock options. In opposition to this conclusion, Mr. Falotti makes a number of contentions, each of which is addressed in turn below.

a. California Authority

Mr. Falotti's first attack on the committee's discretion is that California law prevented the committee from relying on the date he was wrongfully

terminated according to Swiss law for the purpose of determining when he ceased to be employed under the stock-option plan. This argument is rejected because the decision upon which he relies in inapposite.

[15] According to Mr. Falotti, *Bertero v. National General Corp.*, 254 Cal. App. 2d 126 (1967), held that "an employer cannot rely upon a wrongful date of termination established through breach of an employment contract as the effective date of termination for purposes of depriving an employee of additional vests under a stock option agreement" (Br. 23-24). In *Bertero*, the plaintiff was granted two stock options as part of his employment contract. The options gave him the right to purchase stock at his strike price within seven years, as long as he was an employee. Delaying the stock purchases gave the plaintiff considerable tax benefits. The plaintiff was fired without cause in violation of his employment contract, the precise terms of which were unclear in the court's decision. The court held that the plaintiff could still exercise the options, reasoning that he would still have been an employee but for his wrongful termination.

Bertero is not on point for the simple reason that the plaintiff in *Bertero* had already been granted the stock options — the court's decision had nothing to do with vesting. Moreover, unlike Mr. Falotti, the plaintiff in *Bertero* was only terminable for cause. Thus at the time of contract formation, Mr. Bertero had a reasonable expectation that he would be able to postpone exercising the options for seven years. Most significantly, *Bertero* did not address the situation where, as here, there was a web of contracts governed by conflicting laws from different countries, much less require the terms of an employment contract to override an express choice-of-law provision in an internationally-administered stock-option plan. *Bertero* does not control here. This attack is rejected.

b. Inconsistency with Past Decisions by Stock-Option Committee

The second attack made by Mr. Falotti is that the stock-option committee's decision was an abuse of discretion because it was inconsistent with the committee's past decisions. The record, however, does not bear out this assertion.

According to Mr. Boskin, one of the compensation committee members, the committee's policy, was, with infrequent exceptions, to find that an optionee ceased to be employed for the purpose of the stock-option plan when he or she ceased actively working for Oracle (Boskin Dep. 125, 127-28). This statement is supported by the record. According to **[16]** Robert Cortenraad, Director of Human Resources, EMEA, Oracle Switzerland has terminated 26 employees since 1996, and only one of them, Frank Moellhoff, was allowed to vest in options during his notice period (Cortenraad Decl. ¶¶ 7, 9). According to Mr. Boskin, "we gave Frank Moellhoff, as I recall, I think an extra 30 days, maybe, for vesting, something management had negotiated and recommended to us, and we agreed to" (Boskin Dep. 121). The committee, however, denied Mr. Moellhoff's claims that his employment contract entitled him to additional vesting beyond the one month. In his deposition, Mr. Moellhoff stated that it was his understanding that it was Oracle's policy to allow employees to vest during their notice periods (Moellhoff Dep. 106). He could not, however, identify anyone who was permitted to vest in stock options during a notice period after they had been terminated (*id.* at 184). His testimony does not establish that the committee's decision in the present case was not in keeping with its precedent.

In support of his contention, Mr. Falotti argues that Oracle allowed the following former executives to vest during their notice periods: Look Van Den Boog (Mr. Falotti's predecessor), Alistair Crawford, Keith Taylor, and Jean Claude Sainctavit (Br. 10-11). Mr. Van Den

Boog, however, was allowed to vest because he negotiated a "deed of settlement" with Oracle (Henschke Decl., Exh. 27). The settlement included no negative publicity and a release of claims (*id.* ¶¶ 9, 13-14, 16). This compromise does not amount to a policy or a concession by Oracle that the stock-option plan allowed Mr. Van Den Boog to vest during his notice period. At most, it shows that Oracle was aware that there was a tension between its stock-option plan and European law. Mr. Kearney testified in his deposition that both Mr. Crawford and Mr. Taylor negotiated settlements with Oracle as well (Kearney Dep. 39-42), and Mr. Falotti has not offered any evidence contradicting this. Mr. Sainctavit was allowed to purchase stock options that vested during his notice period, but the record is unclear as to why (Westerdahl Dep. 278-79). That one, or even a few, executives were allowed to vest by way of a compromise of threatened claims, or out of a desire to see an amicable separation does not amount to evidence of a policy or an admission by Oracle, or an abuse of discretion by the compensation committee in this case. This attack is therefore rejected.

[17]

c. Refusal to Recognize Swiss Law

Mr. Falotti's third attack is that the compensation committee abused its discretion by ignoring Swiss law. As already stated, the stock-option plan did not require the compensation committee to apply Swiss law. If the compensation committee was entirely unaware that Swiss law may have been applicable, perhaps an abuse of discretion could be found. That was not the case, however, since the materials given to the compensation committee included Mr. Falotti's Swiss-law employment contract, and the committee members testified that they discussed the relevance of

Swiss law. Mr. Boskin testified that at the compensation-committee meeting (Boskin Dep. 171):

> There was some brief discussion of the relevance of Swiss law, and then — there was a discussion of it at the meeting, but I don't recall the specific content of it.
>
> What I do recall is the bifurcation, that California law governed with respect to administration of the plan, and therefore what Swiss law may have provided for, other aspects of things, was irrelevant to our determination.

Mr. Lucas also testified that he aware that Mr. Falotti's employment contract was governed by Swiss law (Lucas Dep. 72). Nor was the committee instructed to ignore Swiss law, as Mr. Falotti alleges. Mr. Boskin testified that Mr. Cooperman, in-house counsel, "said something like it's our view that the plan is clear that California law governs" (Boskin Dep. 161), and that outside counsel advised him that "the determination should be made under California law" (*id.* at 203). Neither of these statements were instructions to ignore Swiss law. There is no evidence that counsel misled the committee. The evidence suggests that the committee considered, and rejected, the theory that Swiss law entitled Mr. Falotti to any stock options, based in part on advice from counsel. That was not an abuse of discretion. Accordingly, this attack is also rejected.

d. Oracle's Recognition of Right to Vest

Mr. Falotti's fourth, and last, attack is that the committee abused its discretion because Oracle recognized that employee's were entitled to vest in stock options during their notice periods. The

evidence offered, however, does not alter this order's conclusion.

[18] In addition to the previously discussed treatment of former executives, a letter sent to EMEA executives in June of 2000, Mr. Falotti contends, demonstrates that Oracle was aware that employees were entitled to vest in stock options during their notice periods. In exchange for shares of stock, the letter asked the employee to relinquish the right to "unvested stock options granted under the 1991 Long-Term Equity Incentive Plan which would have vested during the notice period" (Henschke Decl., Exh. 52). Accompanying the letter was a note from Mr. Kearney, stating: "The change is effective from September 1st so your existing rights will remain unchanged until that date and the company will not dispute any entitlement to options vesting during notice before September 1, 2000" (Henschke Decl., Exh. 26). Additionally, he points to an email from Gary Bloom to Safra Catz, Senior Vice President, Oracle, which read: "There was mention from the legal review that our stock option agreements need to be tighter around the exclusion clause. While the agreement prevents employees from insisting on continued employment for stock to vest, it does not exclude the possibility of compensation for loss of stock options should the employment contract be unlawfully terminated" (Henschke Decl., Exh. 50, at 2). And he notes that Oracle has now revised its stock-option plan to provide no entitlement to stock-options once Oracle has notified the employee of termination "regardless of whether the notice or termination is lawful or unlawful" (Henschke Decl., Exhs. 53-54). None of these communications are evidence that Oracle understood that employees were entitled to vest during their notice periods. They simply show that in the wake of this litigation and similar disputes, Oracle sought to prevent these problems from occurring.

Last, Mr. Falotti argues that an email from Mr. Ellison demonstrates that Oracle was aware of his entitlement to stock options vesting during his notice period. It read (Henschke Decl., Exh. 21):

> Lets give Pier Carlo his notice no later than April 30th. We will offer him a part consulting job after he completes his two month notice period ending June 30th. There will be no more stock vesting after June 30th at the latest. Prepare the papers immediately. We can accelerate Peir [sic] Carlo's termination date to before April 30th if that is in Oracle's interest.
>
> Larry

[19] This email suggests that Mr. Ellison believed that Mr. Falotti would be able to vest during his notice period. Indeed, in his deposition, Mr. Ellison stated: "there was certainly a time when I was told that he was entitled to two months of vesting, and there was a time when I was told he was not entitled to two months of vesting. Different lawyers told me different things" (Ellison Dep. 201). This statement does not mean that the stock-option committee abused its discretion.

It is true that Oracle's Chairman and CEO, Mr. Ellison, testified that his lawyers gave him contradictory legal advice as to Mr. Falotti's option rights. But this ambiguity does not warrant a jury trial. The material facts are not in dispute. There is no need for fact finding by a jury. What is in dispute is the legal conclusion to draw from the record. That the legal conclusion may be debatable does not justify holding a trial on this issue. The Court has the responsibility to decide the law. Holding a trial could not change that outcome.

In sum, the stock-option agreement gave the compensation committee the discretion to determine

when Mr. Falotti ceased to be a full-time employee. For the reasons stated above, the committee's decision was fully consistent with the law and the stock-option plan. The record does not support the conclusion that the committee abused its discretion.

As a way around the stock-option agreement, Mr. Falotti argues that even if he was not entitled to any unvested stock options under the stock-option plan, he should receive the value of the unvested stock options as damages for breach of his employment contract. The thrust of this argument is that the value of the unvested stock options was either consequential damages or wages. As will be discussed below, even if the express severance provision did not foreclose this theory of recovery, it would nonetheless be rejected.

III. Employment Contract

As already stated, because of his illness until July 10 and his notice period, Mr. Falotti argues that under Swiss law, he could not be terminated until September 30. For his contention that breach of his employment contract entitled him to stock options, he relies on Article 337c of the Swiss Code of Obligations, which provides in part:

> If the employer dismisses the employee without notice in the absence of a valid reason, the latter shall have a claim for compensation of what he would have earned if the employment **[20]** relationship had been terminated by observing the notice period or entitle the expiration of the fixed agreement period.

The problem with this theory is that is that the notice period does not entitle an employee to reinstatement. The effect of the notice period is to provide an employee severance benefits in terms of salary to

ensure that the employee is not deprived of an income source during job transition periods. *Beatrice B. v. Solothurn Cantonal Pub. Unemployment Fund, at 3* (Aug. 17, 1989).[3] Oracle had the right to relieve him of his duties and to preclude him from working during his two-month notice period. According to Mr. Falotti's own expert (Henschke Decl., Exh. 12, Aubert Expert Report, at 8):

> It happens often in Swiss business practices that the employer that terminates the employment contract, continues to pay the salary but releases the employee from his obligations of working during the notice period. In this case, the employee continues on the payroll of the company until the end of the notice period and continues to be covered under social insurance. The employee may accept another job that is not in competition with his employer.

According to Mr. Falotti, he was totally incapacitated from working while he was ill from May 30 until July 9. Regardless of when his termination became effective under Swiss law, after May 31, he was either incapable of performing any active work or legally precluded from doing so. As he would not have been a full-time employee providing present or future contributions to Oracle after May 31, under its stated policy and California law, the compensation committee should not have allowed him to vest after this time. The value of the stock options vesting after May 31 was thus not "what he would have earned if the employment relationship had been terminated by observing the notice period."

Mr. Falotti also contends that he was entitled to the value of the stock options because the stock options were considered wages under Swiss law. Swiss Code

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[3] Cooper Decl., Exh. 21 at 3.

of Obligations Article 322 reads: "The employer shall pay the employee the wages that are agreed, or are customary, or are fixed by standard employment contract." Mr. Falotti's employment contract, however, made no mention of stock options as wages. The contract he negotiated provided that stock options would be granted under a separate agreement. It also stated that he would receive some **[21]** stock options as a severance benefit, but as already noted, he has already received all the severance due under his employment agreement.

According to Mr. Falotti's expert, the Swiss definition of wages is expansive (Aubert Rebuttal Report at 6). The Code of Obligations states that the following are wages: "a contractual right to a share of profits, or sales, or in some other manner a right to the proceeds of the business" (Art. 322a); a commission (Art. 322b); and a bonus (Art. 322d). Stock options are conspicuously absent from this list. According to Mr. Falotti's expert, no Swiss court has ever held that stock options are covered by Article 322a (Aubert Dep. 118). The only Swiss decision dealing with stock options, Mr. Falotti's expert states, is *Paterno v. Guyerzeller Bank (ibid.).*

The *Guyerzeller Bank* case, however, is too thin a reed to support the proposition that stock options are always considered to be wages as a matter of Swiss law. In *Guyerzeller Bank*, a bank set up a shell corporation, MHC, to provide executives with a "bonus" that corresponded to a percentage of the bank's profits (Cooper Reply Decl., Exh. 6 ¶¶ B, C). Employees were issued shares of MHC every year, which they could sell back to the bank after six years.

According to the contract between the bank and its employees, if an employee was terminated, the employee could sell back shares for the value of the stock, if the employee was a "good leaver" (*id.* D). Otherwise, the employee was required to relinquish the stock at one dollar per share. The plaintiff, Damiano Paterno, was issued shares in 1995, 1996,

and 1997 (*id.* ¶ G). In 1997, the bank sought to restructure the terms of the stock-option contract so that employees would no longer receive certain tax benefits. Mr. Paterno did not agree to the new contract, and was terminated in October of 1997. In 1998, he sued the bank for the value of the stock he owned. The Swiss court held (*id.* ¶ 4(b)):

> The Defendant's argument to the effect that the amounts in dispute represent a non-payable and arbitrary incentive has to be rejected. Indeed, the litigation or the case in point does not bear on unpaid cash incentives being challenged by the employer as being due, but rather on those incentives which the employer has in fact granted (as confirmed by various messages - see Defendant's items 11 and 13) and which form an integral part of the employee's salary.

[22] This decision did not hold that all stock options are a form of salary as a matter of law. Rather, it held that on the facts of the case, the "bonus" given to Mr. Paterno — stock options that had already vested — was an integral part of his salary. Moreover, the decision distinguished between unpaid incentives and ones which had already been granted.

This Court will not endorse a novel Swiss-law theory creating a rigid definition of stock options from this lone precedent. Based on the distinction between unpaid incentives and salary drawn by the Swiss court, Swiss law seems to recognize a flexible approach similar to the one recognized in California:

> Treatises which describe employee stock options in the context of general corporations law strongly suggest that contractual rights to such benefits vary so widely as to preclude the accuracy of any but the most general characterizations of them. Thus, there is no

> compelling reason to require that employee stock options must always be classified as compensation exclusively for past, present, or future services. Rather, since the purposes underlying stock options differ, reference to the facts of each particular case must be made to reveal the features and implications of a particular employee stock option.

In re Marriage of Hug, 154 Cal. App. 3d 780, 784 (1984).

Based on the facts of this case, this order holds that stock options under Oracle's stock-option plan were not salary. Oracle's stock-option plan stated that its purpose was the following (Cooper Decl., Exh. 5, at OR 40886-87):

> to provide an incentive to eligible employees, officers, independent consultants, directors who are also employees or consultants, and advisers whose present and potential contributions are important to the continued success of the Company . . . and to enable the Company to continue to enlist and retain in its employ the best available talent.

The stated purpose of Oracle's plan was incentive. "Consistent with the emphasis on incentive is the supposition that options are granted for future services, either primarily or exclusively." *Hug,* 154 Cal. App. 3d at 786. Both of Oracle's compensation committee members affirmed this. Mr. Boskin, for instance, stated (Boskin Dep. 93):

> Q: What do you view the purpose of the stock-option grants to employees as being?
>
> A: Purpose of the stock-option grant is a device to attract, retain, and incentivize people to excel in their performance.

[23] Q: To what extent do you consider stock-option grants to be a reward for past performance?

A: I don't.

He testified that allowing Mr. Falotti to vest would have been inconsistent with the purpose of the stock-option. plan (*id.* at 205):

Q: Inconsistent how?

A: Mr. Falotti had been terminated, so I don't see how we could have been incentivizing him to do anything — to do any work for Oracle, given he ceased to work. I don't see how the relevance of the plan to attract talent was relevant to that, because he had — he was no longer with the firm. We didn't want to retain him. We weren't trying to attract him. Those are the three purposes of the plan.

Similarly, Mr . Lucas testified (Lucas Dep. 52):

Q: At Oracle were stock options granted to award past performance?

A: No.

Q: Why were they awarded?

A: Why were they awarded?

Q: Yes.

A: They were awarded as an incentive regarding future performance as long as the person was employed by the corporation.

Under Oracle's stock-option plan, the stock options were not salary: they were incentives for future performance.

Last, Mr. Falotti argues that Article 97 of the Swiss Code of Obligations entitled him to the value of stock options that would have vested in June, July, and September. This provision reads:

> If the performance of an obligation can not at all or not duly be effected, the obligor shall compensate (Art. 43, 99 para. 2) for the damages arising therefrom, unless he proves that no fault at all is attributable to him.

According to Mr. Falotti, this general provision entitles a person to recover all foreseeable damages resulting from a breach of contract (Aubert Expert Report at 10; Aubert Rebuttal Report at 5). Assuming *arguendo* that Article 97 is applicable in the employment context, **[24]** which is disputed, this argument fails for the same reasons already given: his employment contract did not entitle him to stock options.[4]

Mr. Falotti compares this case to a number of American decisions involving stock options. These decisions subdivide into three categories, which are addressed in turn. For the reasons stated below, his analogies to these decisions miss the mark.

a. Stock Options as Wages

Mr. Falotti compares this case to decisions in which other courts allowed wrongfully terminated

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[4] Since there are provisions of the Employment Contracts section of the Code of Obligations (Title X) directly applicable to Mr. Falotti's employment, this more general provision appears to be inapplicable as a matter of Swiss statutory construction. In *P v. SATA*, for instance, the court held that because Article 324 was applicable to the issue of damages for breach of the employment contract: "the general provisions governing the consequences of the failure to fullfill contractual obligations (art. 97 . . .) are not, as a rule, applicable" (Cooper Reply Decl., Exh. 9, at 4).

employees to recover stock options as damages for breach of their employment contracts. The decisions he cites, however, all involved situations where the stock options were considered to be a form of wages. The analogy to these decisions fails, since the stock options at issue were not wages.

In *Williamson v. Moltech Corp.*, 690 N.Y.S. 2d 628 (1999), for instance, the plaintiff had a three-year employment contract, and his stock-option contract provided that he could exercise his stock options as long as he was employed. The court held that "if the plaintiff's employment had been wrongfully terminated, his stock option rights would not be terminated." *Id.* at 539. This holding was echoed in *Scully v. U. S. WATS*, 238 F.3d 497, 506-07 (3d Cir. 2001), in which the plaintiff had a two-year employment contract, and *in Haft v. Dart Group Corp.*, 877 F. Supp. 896, 903 (D. Del. 1995), which held: "Wrongful termination of an employee under a fixed term contract precludes an employer from denying an employee stock option rights." In all these decisions, the stock-option agreements were coupled with employment contracts with fixed durations, during which the employee could not be fired, except for cause. In such a situation, there was a clear expectation from the outset that the employee would continue to vest in stock options during the entire fixed term. Under those circumstances, the stock options were clearly contemplated as compensation. That is not the **[25]** case here, where Mr. Falotti's employment contract allowed termination without cause and expressly provided for partial (but only partial) stock-option vesting by way of severance.

Similarly, in *Langer v. Iowa Beef Packers, Inc.*, 420 F.2d 365 (8th Cir. 1970), the plaintiff's contract provided that he would be able to exercise a stock option after he had worked for the defendant for two years, but that this right would terminate if the plaintiff ceased to be an employee of the defendant. Shortly after the plaintiff had completed two years of

service, the defendant assigned the plaintiff's contract to another company without prior notice to the plaintiff. Applying Iowa law, the Eighth Circuit allowed the plaintiff to exercise the option, finding that plaintiff s working for the defendant for two years was "full consideration" for his right to exercise his stock options. *Id.* at 369. *Langer is* not on point for several reasons, the first being that the plaintiff's right to exercise the stock option in that case had already vested. It also fails as an analogy, because the court in *Langer* had determined that the plaintiff had given "full consideration" for the right to exercise the option. As already stated, that is not necessarily the case when there is an incrementally-vesting stock-option plan and the employee may be terminated without cause. For the reasons previously given regarding the specifics of Oracle's stock-option plan, the present case is not comparable to these decisions.

b. Discrimination Cases

The analogy made by Mr. Falotti to two decisions under anti-discrimination statutes is also unpersuasive. In *Greene v. Safeway Stores, Inc.*, 210 F.3d 1237 (10th Cir. 2000), for instance, an employee who was terminated in violation of the ADEA was allowed to recover damages for "unrealized stock option appreciation," because he was forced to exercise his options — which had vested — before he would have had he not been terminated. *Id.* at 1243. In upholding this award, the Tenth Circuit emphasized that the ADEA allows a court to grant equitable relief necessary to uphold the purposes of the Act: deterrence, and providing compensation for injuries caused by illegal discrimination. *Id.* at 1233-34.

In contrast to *Greene,* the present case is simply for breach of contract. None of the policy considerations implicated in *Greene* come to bear. Rather, the policy behind the forbidden period and the notice period is

to ensure that an employee has some income to sustain **[26]** him or her during job-transition periods. *Beatrice B.*, at 3) (Aug. 17, 1989).[5] The same holds true for *Scarfo v. Cabletron Systems, Inc.*, 54 F.3d 931 (1st Cir. 1995), in which the First Circuit upheld a trial court's determination that a plaintiff in a Title VII case was entitled to damages for the value of stock options she was not issued in contrast to her male counterparts. To the extent that either of these decisions suggested that an employee is entitled to unvested options, both are inapplicable here.

c. General Principles of Contract Law

Mr. Falotti also cites decisions for the even more general principle that a party should not be able to profit from its own wrongdoing. *Eg., Kaneko v. Okuda*, 195 Cal. App. 2d 217 (1961). According to Mr. Falotti, Oracle should not be allowed to profit by violating Swiss law, i.e., by trying to terminate him while he was incapacitated. This argument fails, because it is premised on the assumption that the stock-option committee would have allowed him to continue vesting when he had no job duties, Oracle did not want to retain him, and he was performing no active work. As stated, under Swiss law, an employer does not have to allow an employee to keep working during the notice period, and Mr. Falotti claims that he was unable to work while he was ill. Because he would not have contributed anything to Oracle after May 31, regardless of whether he was sick or entitled to a notice period, he would not have received any stock options after May 31.

IV. Date of Termination Under Swiss Law

While Mr. Falotti's employment contract did not entitle him to the value of unvested stock options as

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[5] Cooper Decl., Exh. 21 at 3.

damages, Oracle still owes him the salary due under the severance agreement, since Oracle has not paid Mr. Falotti any salary since May 31, 2000. Under the severance provision, Mr. Falotti was entitled to one-year's salary from the date his termination became effective under Swiss law. For the reasons already discussed, in his cross-motion for partial summary judgment, Mr. Falotti contends that this date can be no earlier than September 30.

[27] a. Illness

From the decisions cited by the parties' experts, it is apparent that questions of material fact exist as to whether Mr. Falotti was incapacitated from working on May 30, 2000, or thereafter. Given his tenure, under Swiss law, Mr. Falotti had a "forbidden period" of 90 days. During that time, he could not be terminated if he was fully or partially incapacitated from working. Mr. Falotti argues that the medical certificate from Dr. Hadorn establishes that as a matter of law, he had "total working incapacity" and could not be terminated. According to him, a medical certificate establishes a prima facie case that an employee is disabled, and if an employer wishes to contest a medical certificate, it must seek an independent medical examination "immediately." He relies on two decisions: *Mrs. R. v. Ass'n X* (Mar. 12, 1999) and *Mrs. E. v. P. Inc.* (Dec. 12, 1995).

In *Mrs. R.*, the plaintiff was entitled to a 30-day forbidden period. On September 2, the plaintiff obtained a medical certificate from her doctor stating that she was disabled. She continued to work until September 12, when she was hospitalized. On October 4, the defendant informed the plaintiff that she would be terminated on November 30. The plaintiff argued that her termination was ineffective because her 30-day period did not begin to run until September 12, when she actually stopped working. The defendant, on the other hand, argued that the

period began on September 2, the date that the plaintiff obtained her medical certificate, making its termination on October 4 more than one month after she became sick. The court stated: "The employee is responsible for providing proof of occupational disability. In the event of illness or accident, the employee will most often have recourse to a medical certificate. . . . However, the medical certificate does not constitute an absolute form of proof" (Cooper Decl., Exh. 18, Expert Report of Francois Bellanger, Exh. C at 6).[6] The court held that the termination was valid, because from the medical certificate and from her hospitalization only ten days later, it could infer that the plaintiff was suffering from a partial work disability on September 2, triggering the beginning of the forbidden period.

[28] In *Mrs. E.*, the plaintiff, who was pregnant, submitted a medical certificate stating that in addition to her pregnancy, she was disabled from working. Based on statements that she made, however, the cantonal court found that she was not sick and therefore not entitled to a forbidden period. A federal court reversed. It stated that while a medical certificate is not absolute proof of a disability, "the doubt cast on its veracity nevertheless supposes some serious reasons" (Henschke Decl., Exh. 13, page 267 of casebook of Gabriel Aubert).[7] The court further stated that an "employer has a right to have, at its own costs, the existence and the degree of the incapacity examined through a physician chosen by him. It is required that the employer ask for this second opinion immediately" *(ibid.)*. It further noted that: "Concerning a question of valuation of evidence,

---

[6] Mr. Falotti has provided a different translation (Henschke Decl., Exh. 13). There is no significant difference in the two translations.

[7] Oracle's translation is similar (Cooper Opp. Decl., Exh. 21, at 7).

the judge of the case has wide powers in this matter" *(ibid.)*.

Mr. Falotti is correct that both these decisions hold that a medical certificate is entitled to a presumption of correctness. This presumption, however, can be rebutted, and the final determination rests with the finder of fact — a judge in Switzerland, and a jury here. While in *Mrs. E.* the court stated that it "is required" that an employer seek a second examination "immediately," the decision did not hold that an employer's failure to exercise its "right" to do so constitutes a waiver of its right to challenge the certificate's accuracy. Indeed, *in Mrs. E.*, the court stated that other factors may prove dispositive, for instance: "The behavior of a salaried worker may be taken into account in particular, so as to invalidate a medical affidavit" *(ibid.)*. Mr. Falotti's expert, likewise opined in one of his publications, *Right to Wages*, that: "this certificate does not carry absolute weight of evidence. Recent case law shows that the courts, now more often than before, do not hesitate to reject a medical certificate when circumstances cause it to appear to be a product of the employee's deceit with regard to his doctor or complicity by the doctor with regard to the employee" (Cooper Opp. Decl., Exh. 17).

Taking into account the presumption of correctness owed to Dr. Hadorn's certificate, whether Mr. Falotti was ever in fact incapacitated must be determined by a jury. Some of the circumstances surrounding his reported illness support an inference that he was not sick. For instance, he had not seen Dr. Hadorn for around three years, yet hurriedly met with him the day **[29]** before he was told he was terminated. He continued to work, after he was declared to have total working incapacity. He did not mention his illness or submit his medical certificate to Oracle until after he was told he was terminated. He recovered suddenly, after Oracle had requested an independent medical examination. Oracle's experts have opined that Dr. Hadorn's examination was insufficient and his

diagnosis inaccurate (Cooper Opp. Decl., Exh. 19, Expert Report of Dr. Robert Larsen). And, Mr. Falotti stood the possibility of considerable gain if he were sick. Viewing the inferences from this evidence in favor of the non-moving party, Oracle, it cannot be said that Mr. Falotti is entitled to summary judgment that he was suffering from a working incapacity.

b. Notice

Since Mr. Falotti worked for Oracle more than two years, but less than nine, he was entitled to a two-month notice period under Article 335c of the Swiss Code of Obligations. Article 335c also provides that notice period may be partially waived: "These periods may be altered by written agreement, standard employment contract or collective employment contract. They shall, however, be reduced to less than one month only by collective employment contract and only for the first year of service." The letter signed by Mr. Falotti on September 10, 1996, stated: "You further agree that any notice payable for termination without cause payable under your Swiss Employment Agreement shall be waived providing the payment due under the letter shall have been paid." This order does not reach the issue of waiver, since Mr. Falotti's notice period (of at least one month) would have been tolled for any period he was incapacitated from working. Whether Mr. Falotti was sick is a question of fact. The date of his effective termination must be determined at trial.

V. Oral Contract

Mr. Falotti maintains that in January of 2000, Mr. Ellison promised him continued employment through May of 2001, and that this amounted to an oral contract separate from his Swiss-law employment contract. This claim is governed by California law, because Mr. Falotti claims that the alleged contract

was made in California, and it was entirely separate and distinct from his employment contract. Any such contract, however, fails to satisfy the statute of **[30]** frauds. "An agreement that by its terms is not to be performed within a year from the making thereof" is invalid, unless it is "in writing and subscribed by the party to be charged or by the party's agent." Cal. Civ. Code 1624(a). By its terms, the alleged contract could not be completed until a year and several months after formation.

Mr. Falotti contends that the email he sent to Mr. Lane on May 30, 2000, was a writing that satisfied the statute of frauds. The email stated: "Here is the announcement I will send out on June 1" (Moore Decl., Exh. H, at 1). The announcement stated that Mr. Falotti had decided to transfer all of his operational responsibilities to Mr. Giacoletto, so that Mr. Falotti could devote all his time to activities such as "helping the Account Management to reach higher levels of decision-makers in our customer base" and "strengthening management contacts with our partners" (*id.* at 1-2). In response, on May 31, the day Mr. Falotti was told he was terminated, Mr. Lane wrote: "Looks fine" (Moore Decl., Exh. I, at 1). According to Mr. Falotti, Mr. Lane, who was President of Oracle at the time, ratified the agreement between Mr. Falotti and Mr. Ellison. Even assuming that Mr. Lane had the power to ratify the alleged agreement, and presuming this email did so (as opposed to approving of the announcement), this email fails to satisfy the statute of frauds. "[W]hen the aspect of the oral contract that brings it within the statute of frauds relates to its duration ('not to be performed within one year from its making'), both common sense and controlling authority indicate that to constitute a sufficient memorandum the writing must at least contain language indicating the duration promised was as claimed." *Munoz v. Kaiser Steel Corp.*, 156 Cal. App. 3d 965, 975 (1984). This email was silent as to how long Mr. Falotti would perform the services

mentioned. Mr. Falotti argues that an earlier email he sent to Mr. Lane in April satisfies the date requirement. In the earlier email, Mr. Falotti wrote that the conclusion of a discussion he had with Mr. Ellison was: "As of June, I stay for 1 year full time focusing on helping Sergio to master the job (Moore Decl., Exh. G). The earlier email, however, was merely Mr. Falotti's description of the alleged discussion. It was not adopted by anyone at Oracle. Accordingly, Oracle's motion for summary judgment on the oral-contract claim is granted.

[31] VI. Promissory Estoppel

The elements of a promissory-estoppel claim are: (i) a clear promise; (ii) that the promissor should reasonably expect to induce action or forebearance; (iii) upon which the promissee reasonably relies. *Lange v. TIG Ins. Co.*, 68 Cal. App. 4th 1179, 1185 (1999). Whether Mr. Ellison actually promised Mr. Falotti continued employment is a question of fact. Oracle has not argued otherwise. Instead, it contends that it was unreasonable as a matter of law for Mr. Falotti to rely on anything Mr. Ellison told him, and unforeseeable to Oracle that Mr. Falotti would rely on any such statement (Br. 22-23). Whether reliance on Mr. Ellison's alleged promise was reasonable is also a question of fact. Since Mr. Ellison was the foremost decisionmaker at Oracle, any promise from him obviously carried great weight. Additionally, there is evidence in the record that others perceived such reliance was reasonable. For instance, Alan Laing, Oracle's former Vice President of Operations and General Counsel of EMEA, stated that he decided to step down as general counsel and to assume a role in the business side of Oracle based in part on Mr. Falotti's statement that Mr. Falotti and Mr. Ellison had agreed to Mr. Falotti continuing at Oracle in a "quasi chairman" role (Laing Dep. 105, 108-110).

Similarly, there is no merit in the argument that Mr. Ellison could not expect Mr. Falotti to rely on an alleged promise of employment. From Mr. Ellison's testimony it is clear that Mr. Ellison understood that if Mr. Falotti believed that he would not be terminated, he would continue to work for Oracle (Ellison Dep. 173-74). While there is no requirement that an at will employee must be warned of his upcoming termination, this does not mean that an employer can promise employment in order to retain an employee, and then break the promise when it is convenient for the employer to terminate him. Whether Mr. Ellison actually made a promise or whether Mr. Falotti merely hoped to keep working for Oracle cannot be determined at the summary judgment stage.

How any reliance was detrimental, however, is problematic. Mr. Falotti testified that he did not receive any job offers between January of 2000, when the promise was allegedly made, or since (Falotti Dep. 16-17). He testified that after August of 2000, Siebel and another company asked if he was interested in working for them, but that he stated he was not, **[32]** because he did not want to work full-time (*ibid.*). Because no evidence shows that he looked for, or would have received or accepted other jobs between January and May 31, or thereafter, Oracle argues that Mr. Falotti cannot show any legal detriment. Mr. Falotti's sole argument in opposition is that "in reliance on that promise, he was not looking for another job" (Opp. 24). This theory, however, eliminates the detrimental-reliance requirement in a promissory-estoppel claim. While he has not advanced this point in his opposition to Oracle's motion for summary judgment, in opposition to an earlier motion to dismiss, Mr. Falotti argued that his legal detriment was that he continued to work for Oracle when he did not want to, despite the adverse effects job stress was having on his health. There is no evidence in the record supporting that his health deteriorated

between January and May. His claim that he suddenly became incapacitated to work due to depression on May 30 is insufficient to show that he was previously working in the face of illness. At summary judgment he has the burden of putting forth some evidence of detrimental reliance. He has not.

Moreover, without detrimental reliance, Mr. Falotti cannot prove damages. He does not allege, much less provide any evidence, that he was promised any stock options or that he would be allowed to vest in prior grants under the new alleged agreement.[8] In his deposition, he stated that his compensation for the position he was allegedly promised was unknown (Falotti Dep. 211-12):

> Q: All right. Was your compensation for 2001 going to change?
>
> A: Well, I never assumed it was going to stay the same, but I suppose we would have decided when June 1st arrived.

There is no way to gauge with any certainty what salary he and Oracle might have agreed upon after June 1. While this uncertainty would not preclude him from recovering reliance damages, as already stated, nothing in the record shows that he suffered any reliance damages, since nothing shows that he would have received or accepted a job offer. Accordingly, summary judgment in favor of Oracle on this counterclaim must be granted.

---

[8] Mr. Falotti's promissory-estoppel claim is based solely on the theory that the alleged promise by Mr. Ellison was entirely independent of Oracle's prior contractual relationship with him. If it were an oral modification of his existing contracts, it would be foreclosed by California law. *Malmstrom v. Kaiser Aluminum & Chem. Corp.*, 187 Cal. App. 3d 299, 318(1986).

[33]

CONCLUSION

1. Oracle does not owe Mr. Falotti any stock options under Oracle's stock-option plan, beyond options vesting on or before May 31, 2000.

2. Oracle does not owe Mr. Falotti any stock options or the value thereof under Mr. Falotti's employment contract.

3. When Mr. Falotti's termination became effective under Swiss law shall be determined by a jury, for purposes of his lost salary claim.

4. Oracle's motion for summary judgment on Mr. Falotti's counterclaim for breach of oral contract is **GRANTED**.

5. Oracle's motion for summary judgment on Mr. Falotti's counterclaim for promissory estoppel is **GRANTED**.

6. Mr. Falotti's cross-motion for summary judgment is **DENIED**.

The only question remaining in this action is when Mr. Falotti's termination became effective, and how much salary he is due as a result. A jury trial shall commence on **October 15, 2001**.

IT IS SO ORDERED.

Dated: September 17, 2001.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
for the
Northern District of California
September 17, 2001

* * CERTIFICATE OF SERVICE * *

Case Number:3:00-cv-02345

Oracle Corporation

vs

Falotti

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on September 17, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U. S. Mail, or by placing said copy (ies) into an inter-office delivery receptacle located in the Clerk's office.

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORACLE CORPORATION, a Delaware Corporation,

Plaintiff – Appellee,

v.

PIER CARLO FALOTTI, an individual,

Defendant – Appellant.

No. 01-17316
D.C. No. CV-00-02345-WHA (JCS)

ORDER

Before: BERZON, TALLMAN, and CLIFTON, Circuit Judges.

The Panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

Supreme Court, U.S.
FILED
AUG 8 - 2003
OFFICE OF THE CLERK

(2)

No. 03-62

IN THE

Supreme Court of the United States

PIER CARLO FALOTTI,
Petitioner,

v.

ORACLE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in this diversity case, the Ninth Circuit properly applied California state law to a private contract that contained a California choice-of-law clause and an integration clause providing that the contract constituted the parties' entire agreement on the subject at issue?

LIST OF PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The names of all parties appear in the case caption. Respondent Oracle Corporation is a publicly-traded company whose stock is listed on the NASDAQ exchange. Respondent has no parent company and no publicly held company owns 10% or more of its stock.

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Swiss Code of Obligations Art. 336c 7

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

The opinions below and the basis for this Court's jurisdiction are adequately set forth in the Petition. Pet. at 1-2.

STATUTES INVOLVED

There are no federal statutes involved in this case.

COUNTER STATEMENT OF THE CASE

1. This case involves the claim of Pier Carlo Falotti, a former senior executive of Oracle Corporation ("Oracle" or "Respondent") based in Switzerland, to $85 million worth of stock options that had not yet vested under Oracle's 1991 Long-Term Equity Incentive Plan ("Stock Option Plan")

when Oracle fired him. Under the express terms of the Stock Option Plan and its related Grant and Exercise Agreements (collectively, the "Stock Option Agreement"), vesting occurs only if an optionee remains a "full-time employee" on the vesting dates established by the grant. The Stock Option Agreement contains a California choice-of-law provision and is fully integrated—*i.e.*, it states that it constitutes the parties' entire agreement on the subject of stock options and supersedes any prior agreements on that subject. Pet., App. B at 24a-26a.

The Stock Option Agreement gives the Committee on Compensation and Management Development of Oracle's Board of Directors ("Compensation Committee") broad discretion to determine when employment ceases for purposes of the Stock Option Agreement. The unanimous decision of the Ninth Circuit does nothing more than hold as a matter of California law that the Compensation Committee did not abuse its discretion when it determined in Mr. Falotti's case that his eligibility to vest in stock options ceased when he ceased to perform any services for any Oracle entity. Pet., App. A at 10a-17a.

2. When recruited to join Oracle in 1996, Mr. Falotti was a sophisticated business executive with nearly 25 years of experience managing European operations for U.S. technology companies. Following lengthy negotiations, on July 10, 1996, Mr. Falotti accepted Oracle's written offer of employment as Oracle's Senior (later, Executive) Vice President in charge of Europe, Middle East and Africa ("EMEA") at an annual salary, including incentives, of $1 million a year ("July 1996 Letter Agreement"). The July 1996 Letter Agreement provided that Respondent would request its Board of Directors' approval for an initial grant of 600,000 stock options, which, if granted, would be the subject of a separate agreement. The July 1996 Letter Agreement was for an indefinite term and provided that Oracle could terminate Petitioner with or without cause. Pet., App. A at 2a-3a.

In the negotiations, Mr. Falotti insisted upon having a separate employment contract that would be subject to Swiss law. However, unlike the July 1996 Letter Agreement with Oracle, none of the documents that comprised his agreement with Oracle's local Swiss affiliate, Oracle Software (Suisse) S.A. ("Oracle Switzerland"), made any mention of stock options. Pet., App. A at 4a, 9a. This intentional omission was an accommodation to Mr. Falotti, who had insisted that most of his compensation and *all* stock options be paid to him outside Switzerland "with no local or Swiss tax implications for myself." 7:ER1923.[1] By deliberately separating his stock options from the agreement with Oracle Switzerland in this manner, Petitioner paid no taxes in Switzerland or anywhere else on the more than $80 million in stock option income he received while he was employed by Oracle (and paid Swiss taxes on only a minor portion of his Oracle Switzerland salary). 9:ER2275-78.

3. As Petitioner repeatedly acknowledged in the proceedings below, neither his employment agreement with Oracle Switzerland nor Swiss law gave him any right to stock options. 12:ER3297; 4:ER920; 2:ER400. Instead, Mr. Falotti's right to vest in stock options depended entirely upon the terms of the Stock Option Agreement. That Agreement, as Petitioner concedes, contains a comprehensive integration clause and chooses California law. Pet. at 5. Under its express terms, an optionee is not entitled to vest in any remaining stock options once he "ceases to be employed." Pet., App. A at 4a. Anticipating situations such as this case presents, Section 6(k)(iv) of the Stock Option Plan states as follows:

---

[1] Citations to materials not in the opinions below are to Petitioner's Excerpts of Record ("ER") submitted to the Court of Appeals. The citation format "7:ER1923" refers to Volume 7 of the ER, at page 1923.

> (k) Limitations on Exercise. Notwithstanding the exercise periods set forth in the Grant, exercise of an Option shall always be subject to the following:
>
> * * *
>
> (iv) The [Compensation] Committee shall have discretion to determine whether Participant has ceased to be employed by the Company or any Parent, Subsidiary or Affiliate of the Company and the effective date on which such employment terminated . . . .

7:ER1936 ¶ 6(k)(iv); *see also* 7:ER1947 ¶ 3.

4. By January 2000, Petitioner had agreed to step down as Executive Vice President in charge of EMEA effective May 31, 2000, the last day of Respondent's fiscal year. As that date approached without any agreement on his future duties or compensation, Mr. Falotti had ample reason to be concerned about his continued employment. After visiting Swiss employment counsel on the afternoon of May 29th (9:ER2299), Mr. Falotti made an urgent visit to his personal physician (whom he had not seen in three years) early on the morning of May 30th. He left twenty minutes later with a note stating that he had a "[t]otal incapacity to work" of indeterminate duration effective May 30, 2000. Mr. Falotti then went to work as usual, and he did not mention any illness or his doctor's certificate to anyone at Oracle or Oracle Switzerland. Pet., App. B at 28a, 55a.

5. In a telephone conversation on the afternoon of May 31, 2000, Lawrence J. Ellison, Oracle's Chairman of the Board of Directors and Chief Executive Officer, fired Mr. Falotti, relieving him of all responsibilities and authority and telling him not to return to the office. During this telephone call, Petitioner advised Mr. Ellison that he was immune from termination under Swiss law because he had a "headache." He said, "You don't work in Switzerland as long as I have without being familiar with Swiss law." Pet., App. B at 28a. Based on the substance and tone of the discussion,

Mr. Ellison did not believe that Mr. Falotti was sick. On the contrary, he believed that Mr. Falotti was wrongfully seeking to take advantage of Swiss law protections for employees who are medically incapacitated and that his assertion of illness was untrue. 10:ER2506.

As explained below, Petitioner may have a right of action to recover the wages and benefits he would have earned under his Swiss employment agreement if Oracle Switzerland failed to honor any applicable notice or "forbidden" period specified by Swiss law. *See* p. 7, *infra.* It is undisputed, however, that it was entirely proper and normal under Swiss law to relieve Mr. Falotti of his duties effective immediately and that Swiss law provides no remedy through which Mr. Falotti could obtain reinstatement. Pet., App. A at 9a. Accordingly, Oracle committed no wrongful act by permanently terminating Mr. Falotti's status as a full-time employee eligible to vest in stock options on May 31, 2000. Indeed, as the district court observed, Mr. Falotti's own Swiss law expert agreed that he was no longer a "full-time" employee after that date. Pet., App. B at 44a.

6. On June 22, 2000, Petitioner sought permission to exercise stock options that had not vested as of his May 31, 2000 termination date. The Compensation Committee considered the matter and, relying on its discretion under the Stock Option Agreement, unanimously concluded that, for purposes of the Stock Option Agreement, Mr. Falotti ceased to be employed on May 31, 2000 when he ceased to perform any services for any Oracle entity. Pet., App. A at 4a, 9a. The Committee's decision was based on its fundamental recognition that stock options are incentives for *future* contributions and not earned benefits for past service. Pet., App. B at 36a, 47a-49a. Both the Ninth Circuit and the district court held that the Compensation Committee properly exercised its discretion in making this determination and did not violate the duty of good faith and fair dealing imposed by California law. Pet., App. A at 17a; App. B at 36a, 42a-43a.

Pursuant to Rule 15.2 of the Rules of this Court, Respondent corrects and supplements Petitioner's Statement of the Case as follows:

1. Petitioner represents, without reference to the record, that Oracle's Stock Option Plan provides that where an optionee has a written agreement governing the employment relationship, "the working 'relationship is [only] terminable in accordance with the terms of any agreement you have with the company governing the relationship.'" Pet. at 5; *see also* Pet. at 7 n.6. There is a simple reason why Petitioner offers no record cite for the quoted material—the Plan says no such thing. In his petition for rehearing in the Ninth Circuit, Petitioner claimed that the same quotation is derived from Paragraph 47 of the Questions & Answers accompanying the Stock Option Plan. That paragraph, quoted in full, says:

> 47. **Is a grant of an Award under the Plan a guarantee of continued employment by the Company?**
>
> No. Neither the Plan nor any Award under the Plan imposes any obligation upon you or the Company to continue your relationship with the Company. If you are an employee or officer, such relationship is terminable at will by you or the Company. *If you are a consultant or adviser, such relation is terminable in accordance with the terms of any agreement you have with the Company governing the relationship.* If you are a director, such relationship is terminable in accordance with applicable corporate laws.

(2:ER345, emphasis added.)

Thus, the sentence from which Petitioner selectively quotes unambiguously *applies only to consultants and advisors*—a critical limitation that Mr. Falotti omits in his Petition—and has no applicability whatsoever to him. Instead, the immediately preceding sentence—which Petitioner does not

mention—makes clear that, as an officer and employee, Mr. Falotti's employment was *terminable at will*.

2. Petitioner's assertions that his employment agreement with Oracle Switzerland incorporated certain provisions of Swiss law (Pet. at 3) and that he had "acquired contractual and legal rights guaranteeing him continued employment" (Pet. at 9 n.10, 16) misrepresent both his contract and the applicable provisions of Swiss law. The parties merely agreed that the Swiss employment agreement, which covered part of his salary and fringe benefits, would be *subject to* Swiss law. Pet., App. A at 3a. Under Swiss law, Mr. Falotti would have a right of action to recover the wages and benefits he otherwise would have earned under his employment agreement with Oracle Switzerland if Oracle Switzerland failed to honor an applicable notice or "protected" period.[2] *See* Pet., App. A at 8a-9a. Swiss law did not guarantee him continued active employment or reinstatement to his former position.

3. Petitioner's characterization of his termination as "unlawful" (Pet. at 5-6) equally misstates Swiss law. As Mr. Falotti's own expert witness on Swiss law affirmed, an employee may be immediately relieved of duties and excluded from the workplace. 11:ER3020-23. Therefore, Oracle irrevocably ended Petitioner's status as a full-time employee on May 31, 2000 in a manner that was entirely consistent with Swiss law.

4. Petitioner's assertion that the courts below never found legal justification for Respondent's alleged breaches of Mr. Falotti's employment agreement with Oracle Switzerland

---

[2] The notice period under Swiss law provides a period of continued salary and benefits payments after notice of termination as a means of support while the individual seeks other employment. The "protected" period may extend the applicable notice period up to 90 days if an individual is unable to work due to illness. Pet., App. B at 34a-35a, citing Articles 335c and 336c of the Swiss Code of Obligations.

(Pet. at 6 n.4) is incomplete and misleading. Far from "acknowledging" any breach of Petitioner's Swiss-law employment agreement, Respondent has vigorously disputed Mr. Falotti's claim to have suddenly become totally disabled one day before he knew he was going to be replaced as Executive Vice President. The district court held that there were substantial disputes of material fact precluding summary judgment as to whether Mr. Falotti "was ever in fact incapacitated," noting that "[s]ome of the circumstances surrounding his reported illness support an inference that he was not sick" and that he "recovered suddenly after Oracle had requested an independent medical examination." Pet., App. B at 55a-56a. The Ninth Circuit found it unnecessary to resolve the question because the Stock Option Agreement did not in any event entitle him to vest in stock options after he ceased to perform any services for any Oracle entity. Pet., App. A at 9a; *see also* Pet., App. B at 52a. Thus, neither court found that Oracle breached any obligation to Petitioner under Swiss law.

5. Petitioner fails to mention that the parties' Swiss-law employment agreement of September 10, 1996 specifically stated that, in the event of conflict between the July 1996 Letter Agreement and Swiss law, the July 1996 Letter Agreement would control. Pet., App. A at 4a. As noted above, the July 1996 Letter Agreement provided that Petitioner was terminable at will, with or without cause. *See* p. 2, *supra.*

6. Petitioner's assertion that "[t]he only distinction between Falotti and his contemporaneously terminated co-workers was that Oracle had granted an exponentially larger number of stock options to Falotti than to them" (Pet. at 8 n.8) omits critical facts. As the district court correctly found, all but one of these former co-workers received stock options as part of settlement agreements compromising their severance benefit claims (Pet., App. B at 38a-39a); this fact clearly distinguishes these former employees from Petitioner, who

rejected such a settlement (10:ER2501-02). As to the one other former employee, both the Ninth Circuit and the district court found that the Compensation Committee's determination in that case was entirely consistent with its determination in Petitioner's case. Pet., App. A at 16a-17a, App. B at 38a.[3]

7. Petitioner omits mention of the proceeding he initiated against Oracle Switzerland before the Juridiction des Prud'hommes in Geneva, Switzerland, shortly after Respondent filed this declaratory judgment action. In that proceeding, Petitioner is pursuing the exact same claims for stock options (or their value in damages) that he is pursuing here as well as claims for salary and benefits under his employment agreement with Oracle Switzerland. Notwithstanding his arguments about principles of "international comity" in this case, Petitioner has taken the position in that case that the Swiss courts should ignore the Ninth Circuit's decision *in toto*.

ARGUMENT

This case is about Petitioner's claimed entitlement to continue to vest in Oracle stock options after he was notified of his termination and relieved of his duties. Petitioner, who was a very senior executive of Respondent, exercised $80 million worth of Oracle stock options tax-free during his tenure and sought $85 million more in this action. While the case is thus of considerable monetary importance to Petitioner and Respondent, it is unique and fact-bound. The decision below is one of straight-forward contract interpretation where

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[3] There likewise is no record support for Petitioner's assertion that "Oracle's written policy had previously been 'not [to] dispute any entitlement to options vesting during notice' periods." Pet. at 8. The quoted material is taken out of context from a series of questions and answers accompanying letters sent to selected European managers, in which Respondent proposed certain modifications to their employment contracts. *See* Pet., App. B at 41a.

the contract governing stock options was fully integrated and specifically elected California law. The case was in federal court solely on the basis of diversity jurisdiction, and the questions presented by the Petition were not raised below. Four judges (the district court and the unanimous Ninth Circuit panel), including two sitting in California, agreed on the outcome, and no active Ninth Circuit judge voted for a poll on Petitioner's suggestion for rehearing *en banc*. Petitioner has not identified any valid reason why this Court should review the Court of Appeals' decision.

I. THE QUESTIONS PRESENTED BY THE PETITION WERE NOT RAISED BELOW AND WOULD NOT HAVE AFFECTED THE COURT OF APPEALS' DECISION.

A. Petitioner Did Not Assert Principles Of "International Comity" In The Proceedings Below.

Notwithstanding Petitioner's attempt to conjure up a cert-worthy issue, neither the Ninth Circuit's actual ruling nor the record below raises the questions presented by the Petition. Indeed, while Petitioner now claims that this Court's "international comity doctrine" is fundamental to his case, neither the phrase "international comity" nor any of the cases cited in the Petition to support this argument appear anywhere in Petitioner's Opening Brief, Reply Brief or Petition for Rehearing and Suggestion for Rehearing En Banc in the Ninth Circuit. Nor do they appear anywhere in the Ninth Circuit's opinion.[4]

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[4] At most, Petitioner argued in his Motion to Dismiss Plaintiff's First Amended Complaint for Lack of Personal Jurisdiction that the district court should stay its proceedings under an asserted doctrine of "international abstention" pending the outcome of his subsequently-filed claims for the exact same stock options (or their value in damages) in Switzerland. 1:ER148-150. The district court rejected Petitioner's argument and no appeal was taken from that decision. 1:ER264-68.

Because the questions presented by the Petition were not advanced in the proceedings below and were not addressed by the Ninth Circuit, they should not be considered by this Court. *United States v. United Foods, Inc.*, 533 U.S. 413, 416-17 (2001) (refusing to consider new substantive arguments attacking a judgment that were not pressed below or passed on by the Court of Appeals). *See also, e.g., Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981) (question presented in petition but not raised in court of appeals "is not properly before us"); *Youakim v. Miller,* 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

B. The Ninth Circuit's Decision Turns On California Law And Application Of Principles Of "International Comity" Would Have Had No Impact On The Outcome.

Even if Petitioner's failure to raise any issue of "international comity" in the proceedings below did not bar review by this Court, the questions presented by the Petition do not warrant such review. While cloaked in the guise of "international comity," Petitioner's real objection is that the Ninth Circuit misconstrued California law.[5] Thus, he contends that California law obliged the Compensation Committee to give effect to certain provisions of Swiss law providing protection for terminated employees. Pet. at 18. He claims that his Swiss employment rights affected his status as "*a purely at-will employee* in California." Pet. at 11, 13, 16, 18, 20, 23.[6] He contends that "in applying California law

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[5] Petitioner conceded in the district court that the stock option agreement was governed by California law. *See* Pet., App. B at 35a. ("[a]s both sides acknowledge, the stock-option agreement was governed by California law.")

[6] Petitioner's repeated assertions that the Ninth Circuit erred by treating him as a "*purely at-will employee* in California" reflect nothing more than his disagreement with that court's factual findings and its application of

under the stock option plan both the Compensation Committee and the Ninth Circuit" were required to consider Mr. Falotti's employment status for purposes of the Stock Option Agreement as modified by his Swiss employment contract. Pet. at 18-19. Finally, he contends that the Ninth Circuit improperly allowed the Compensation Committee to ignore "controlling California law and contractual right." Pet. at 25. An interpretation of California contract law is not a "federal case," much less a decision implicating principles of "international comity."

Furthermore, contrary to Petitioner's contention (Pet. at 20-25), there is no reason to believe that the application of principles of "international comity" would have been outcome-determinative. As noted above, Petitioner repeatedly conceded in the proceedings below that neither his employment agreement with Oracle Switzerland nor Swiss law gave him any right to stock options. *See* p. 3, *supra.* Indeed, as both lower courts found, Petitioner's employment agreement with Oracle Switzerland *does not mention stock options at all*, an intentional omission upon which Mr. Falotti himself insisted, presumably to avoid taxes. *See* p. 3, *supra.* Accordingly, "enforcement" of Petitioner's employment agreement with Oracle Switzerland and the notice provisions of Swiss employment law would not have changed the Ninth Circuit's decision in this case in any way.

II. THE COURT OF APPEALS' DECISION WAS CORRECT AND DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioner's basic argument here, as in the courts below, is that the additional stock options he seeks would automatically have vested if Respondent had honored the allegedly applicable Swiss-law notice provisions. Pet. at 9 n.10. But,

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settled principles of California law to those facts. Such disagreements do not warrant this Court's review. Sup. Ct. R. 10.

as the Ninth Circuit correctly pointed out, that simply is not true. Pet., App. A at 9a. Even if Mr. Falotti were entitled to Swiss-law notice periods, that would only have entitled him to payment of the salary and fringe benefits provided under his Swiss employment agreement. It would not have entitled him to stock options, which the Ninth Circuit found to be governed by an entirely separate contract. *Id.*

This conclusion was demonstrably correct given that (i) the July 1996 Letter Agreement stated that stock options, if granted, would be "issued under a written agreement" (7:ER1901); (ii) the resulting Stock Option Agreement contained an integration clause stating that the Stock Option Agreement "constitutes my entire agreement with the Company and supersedes all prior undertakings and agreements between us" with respect to stock options (7:ER1954 ¶ 9); and (iii) Petitioner's employment agreement with Oracle Switzerland does not mention stock options (*see* p. 3, *supra*).

The Ninth Circuit also properly recognized that, in the Stock Option Agreement, Respondent had bargained for its right to retain discretion to determine—under California law—when employment ceased. Pet. at 12a. Otherwise, a multi-national corporation like Respondent, with employees all over the world, could not administer a stock option incentive program in a uniform manner, leaving employees' entitlement to stock options dependent on the vagaries of local employment laws in dozens of different countries. In these circumstances, the Ninth Circuit found that honoring a clearly-expressed choice-of-law provision was fully consistent with its precedents. *See* Pet., App. A at 10a. Nothing in its decision warrants this Court's review.

III. THE PETITION DOES NOT SATISFY THIS COURT'S STANDARDS FOR REVIEW ON WRIT OF CERTIORARI.

A. The Decision Below Does Not Conflict With Decisions Of Other Courts Of Appeals Or Any State Court Of Final Resort.

Petitioner has identified no conflict between the decision below and any decision of another United States Court of Appeals or a state court of last resort on an important federal question. *See* Sup. Ct. R. 10(a). Petitioner's allegations of conflict with another Ninth Circuit decision and an intermediate California state appellate court decision, even if they had merit, would not meet this Court's stringent standards for review.

At most, Petitioner erroneously suggests that there is a conflict between the Ninth Circuit's decision below and its decision in *McGhee v. Arabian American Oil Co.*, 871 F.2d 1412 (9th Cir. 1989). In *McGhee*, however, the Ninth Circuit found, and the parties agreed, that contract provisions expressly incorporating Saudi Arabian employment law supplanted language in the contract calling for termination at will. *Id.* at 1417. Here, by contrast, Petitioner's employment agreement with Oracle was terminable at will, with or without cause, and Swiss law provided him no right to reinstatement. *See* pp. 2, 5, *supra.* Accordingly, even if an intra-circuit conflict were ground for granting certiorari, there is no conflict between *McGhee* and the Ninth Circuit's decision below.[7]

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[7] Petitioner first suggested a conflict between the Ninth Circuit's decision in this case and its decision in *McGhee* in his Petition for Rehearing and Suggestion for Rehearing En Banc. The lack of any actual conflict is underscored by the fact that no Ninth Circuit judge even requested a vote on whether to rehear this case *en banc*. Pet., App. C at 64a.

Petitioner's reliance upon the California Court of Appeals decision in *Bertero v. National General Corp.*, 254 Cal. App. 2d 126, 62 Cal. Rptr. 714 (1967) (Pet. at 25), likewise fails to create any issue worthy of this Court's time or attention. Like the decision below, *Bertero* involved nothing more than that court's interpretation of the terms of the particular contract at issue in that case. As the district court observed, the case had nothing to do with stock option vesting after notice of termination and, unlike Mr. Falotti, the employee in *Bertero* was terminable only for cause. Pet., App. B at 37a. Therefore, even if *Bertero* had been decided by the California Supreme Court and even if it had involved an "important question of federal law," it is factually distinguishable and provides no ground for review of this case by this Court. *See* Sup. Ct. R. 10(a)—(c).

B. The Decision Below Does Not Have Any Far-Reaching Importance.

Petitioner asserts that "American courts are increasingly confronted with business disputes between multinational corporations and their foreign based employees" and that "[q]uite often stock option plans are at the heart of these disputes." Pet. at 2. If there are any such stock option cases apart from this one, the Petition fails to cite them. Even if there were any other such cases, however, they would involve a different stock option contract and a different set of facts.[8] Petitioner's attempt to create an "important federal question" out of this straight-forward case of contract interpretation amounts to nothing more than a disagreement with the Ninth Circuit's well-reasoned application of settled state law to the particular facts of his case.

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[8] Indeed, as Petitioner notes, Oracle has amended its Stock Option Plan since the events giving rise to this dispute. *See* Pet. at 12 n.13. This Court's review, therefore, would be unlikely to have any impact beyond the parties to this specific dispute.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

PIER CARLO FALOTTI,

Petitioner,

v.

ORACLE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. The Reasons That Falotti Has Asserted For Granting His Present Petition Satisfy This Court's Standards For Review And Were Properly Raised Below

In his opening Petition ("Pet."), Pier Carlo Falotti ("Falotti") cites to no less than 17 decisions by this Court as precedent supporting his choice-of-law and international comity grounds for appeal. But rather than addressing any of these decisions *on their merits*, Oracle's Opposition ("Opp.") instead focuses upon a litany of flimsy *procedural attacks* that prove unavailing for the reasons detailed below.[1]

First, Oracle argues that Falotti has failed to "satisfy this Court's standards for review" because he purportedly "has identified no conflict between the decision below and any decision of another United States Court of Appeals or a state court of last resort on an important federal question." (Opp. at 14-15). What such an argument conveniently overlooks, however, is the alternative criterion of Supreme Court Rule 10(c) which allows for review when a "United States court of appeals...has decided an important federal question in a way that conflicts with relevant decisions of this Court." Here, by refusing to respect and enforce Falotti's binding Swiss contractual rights, the Ninth Circuit has clearly violated this Court's well-established choice-of-law and international comity teachings dating back to at least the 1830s.

Second, Oracle also argues that this Court should decline review as a matter of discretion because the

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[1] The remainder of Oracle's Opposition largely consists of a "Counter Statement Of The Case" that repeatedly mischaracterizes the record below in a gratuitous effort to paint Falotti with a black hat. (Opp. at 1-9). However, since few of these ostensible "facts" asserted by Oracle have any relevance to the issues raised by this appeal, and since they are unreflective of any actual findings made by the lower courts, Falotti will leave their debate for a later day.

present case is purportedly so "unique and fact-bound" that is "does not have any far-reaching importance." (Opp. at 9, 15). Yet in addition to Falotti having already demonstrated the contrary (Pet. at 1-2), this argument is further belied by the stance that Oracle itself has taken in this case. Indeed, elsewhere in its Opposition, Oracle contends that unless the Ninth Circuit's erroneous decision herein is upheld, "multi-national corporation[s] like Respondent, with employees all over the world, could not administer a stock option incentive program in a uniform manner, leaving employees' entitlement to stock options dependent on the vagaries of local employment laws in dozens of different countries." (Opp. at 13).

Similarly, in the proceedings below, Oracle solicited the filing of an *amicus curiae* brief from the so-called Employers Group of which Oracle is a charter member. The *amicus* brief argued on Oracle's behalf that the present case reaches well "beyond the immediate concerns of the parties" so as to significantly impact all "multistate and multinational companies who desire to provide stock option incentives to their employees." According to the Employers Group, Falotti's contentions in this case "pose a genuine threat to the continued viability of the ... [stock option] form of compensation," and if Falotti were ultimately to prevail on appeal it "would spell the end for stock option plans as we know them today."[2]

Third and finally, Oracle's argument that Falotti is somehow barred from asserting "principles of

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[2] The greater importance of this case, of course, is the regrettable precedent it sets permitting American multinational corporations to wrongfully breach and disregard the contractual employment rights of their foreign-based employees in the ostensible name of stock option plans that are silent as to all employment related issues.

international comity" before this Court because they were supposedly "not raised or resolved in the lower court[s]" is simply frivolous. (Opp. at 10-11).[3] Falotti's primary theory of this case has always been premised upon the core tenet of international comity -- *viz.*, that in California both the Oracle Compensation Committee and the courts were required to respect and enforce the contractual rights that Oracle had conferred upon Falotti under their Swiss law employment agreement. *See, e.g.*, **(i) (Pet. Op. Br. at 60)** (the District Court erred when it "wrongly concluded that the committee [was not] required to consider [Falotti's] Swiss law" contractual rights); **(ii) (Pet. Rep. Br. at 12)** ("California law required the Committee to honor the Swiss law rights incorporated into... [Falotti's] Employment Agreement."); **(iii) (Pet. Reh. Br. at 4)** ("in applying California law under the Stock Option Agreement, the Committee was required *to take Falotti as it found him* -- i.e., as an employee with preexisting and fully enforceable [Swiss law] contractual rights against Oracle which precluded a purely at-will termination.").[4]

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[3] Notably, Oracle does not even *attempt* to argue that this Court would be barred from reviewing the choice-of-law issues likewise incorporated in Falotti's "Questions Presented."

[4] Moreover, as Falotti has previously shown (Pet. at 9-12), the lower courts went on to erroneously resolve these international comity issues in favor of Oracle. The District Court held that there was no "require[ment] to consider [Falotti's] Swiss law" rights, and that doing so would improperly "override an express choice-of-law provision in an internationally-administered stock-option plan." (*Id.*)(*citing* App. B at 36a-37a). The Ninth Circuit affirmed by similarly refusing to respect and enforce Falotti's Swiss contractual rights, concluding that this would be tantamount to wrongly "ignoring the [stock option plan's California] choice-of-law clause in favor of Swiss law." (*Id.*)(*citing* App. A at 10a).

In sum, Oracle's Opposition fails to erect any procedural barrier that would prevent this Court from reaching the merits of Falotti's appeal.

II. Falotti Is Appealing The Ninth Circuit's *A Priori* Violations Of Well-Established Choice-Of-Law And International Comity Principles Rather Than Its Holdings As To The Applicability Or Interpretation Of California Law

Throughout its Opposition, Oracle seeks to "de-federalize" the subject matter of Falotti's Petition by mischaracterizing it as presenting a dispute about the applicability and interpretation of California law. (Opp. at i, 9, 11-12, 15). According to Oracle, Falotti simply disagrees "with the Ninth Circuit's well-reasoned application of settled law to the particular facts of his case," and his "real objection is that the Ninth Circuit misconstrued California law." (*Id.* at 15, 11). As demonstrated below, however, such arguments reflect a profound misunderstanding of the questions that Falotti has presented to this Court for review.

As an initial matter, Falotti is *not* appealing the Ninth Circuit's conclusion that, pursuant to an express choice-of-law provision, California law properly governs the administration of Oracle's stock option plan. That conclusion was never a subject of dispute between the parties in the proceedings below.

Nor does Falotti's current Petition reflect any disagreement with the Ninth Circuit over the substance of California law. As Falotti has shown, California law is clear that where, as here, an employee has an at-will employment relationship *modified by* the rights to receive termination notice or illness protection periods, the employment relationship continues intact until after those

contractual periods have fully run their course. (Pet. at 21-22)(*citing Romano v. Rockwell Internat. Inc.*, 14 Cal. 4th 479, 495 (1996); *Chardon v. Fernandez*, 454 U.S. 6, 8-9 (1981)). This is true irrespective of whether the employer chooses to exercise its control over the employee by actually demanding his continued work performance. (Pet. at 22-25)(*citing Malloy v. Fong*, 37 Cal. 2d 356, 370 (1951); *Bertero v. National General Corp.*, 254 Cal. App. 2d 126, 132-34 (1967); *Lyon v. Pollard*, 87 U.S. 403, 407 (1874)). Not once in the proceedings below did either Oracle or the Ninth Circuit ever take issue with these fundamental principles of California law that support Falotti's claims to relief.

What Falotti's Petition instead addresses is a legal error of federal and international importance that the Ninth Circuit committed *in the first instance* before it ever reached the stage of applying or construing California law. In short, the Ninth Circuit held as a matter of federal jurisprudence that there is no requirement to respect and enforce the Swiss contractual rights conferred by Falotti's employment agreement with Oracle, and that Falotti can accordingly be treated as a *purely at-will employee* in California bereft of any contractual protections. (Pet. at 11-13). But by embracing such a legal fiction,[5] the Ninth Circuit departed from this Court's international comity teachings which require that United States

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[5] Oracle seeks to recharacterize this *legal fiction* as a "factual finding[]...[that does] not warrant this Court's review." (Opp. at 11-12 n. 6). But the courts below never denied as a *factual matter* the existence or validity of the parties' employment agreement, nor disputed the substance of Falotti's Swiss law protections incorporated therein. Rather, the lower courts erroneously found that as a *legal matter* this agreement need not be respected and enforced in California when determining Falotti's stock option rights.

federal courts give effect to valid private rights arising under foreign law. (*Id.* at 13-16). Moreover, the Ninth Circuit also misapplied this Court's choice-of-law precedent in concluding that the election of California law in Oracle's stock option plan somehow justified a rejection of the mandates of international comity. (*Id.* at 17-19).

Ironically, having committed these dispositive legal errors at the outset of its analysis, the Ninth Circuit then proceeded on to *correctly* apply California law. Indeed, if Falotti were truly a *purely at-will employee* with no additional contractual protections, then Oracle would have had every right under California law to fire him "effective immediately" on May 31, 2000, and to withhold further stock options that had not yet vested as of that date. (Pet. at 6). But those were decidedly *not* Falotti's circumstances. The Ninth Circuit arrived at such a legal fiction only by initially disregarding the parties' Swiss law employment agreement in violation of this Court's choice-of-law and international comity directives.

Thus, contrary to Oracle's Opposition arguments, Falotti's appeal raises fundamental questions of federal and international importance that are unrelated to any claim that the "Ninth Circuit misconstrued California law." (Opp. at 11).

III. The Ninth Circuit's Violations Of This Court's Well-Established Choice-Of-Law And International Comity Principles Were Outcome-Determinative Of The Proceedings Below

Oracle's final fallback position is that "there is no reason to believe that the application of principles of 'international comity' would have been outcome-

determinative" in the proceedings below. (Opp. at 12). According to Oracle, even if the Ninth Circuit had respected and enforced Falotti's contractual rights to Swiss law termination notice and "forbidden" periods, it "would have had no impact on" its determination that he purportedly "ceased to be employed" for stock option purposes on May 31, 2000. (*Id.* at 11). As demonstrated below, however, these arguments are premised upon a series of demonstrably false propositions.

First, Oracle argues that enforcement of Falotti's Swiss law rights would have been immaterial because those rights existed only as against its subsidiary, *Oracle Switzerland*, and formed no part of any agreement between Falotti and *Oracle itself*. (Opp. at 7). But what Oracle fails to inform this Court is that the courts below long ago decided this issue to the contrary -- a decision from which Oracle has never taken an appeal. Indeed, the District Court held that *Oracle itself* entered into an employment contract with Falotti in which it agreed that their entire "employment [relationship] will be governed by the laws of Switzerland." (App. B to Pet. at 22a).[6]

Second, Oracle now baldly asserts for the first time in this litigation that, in substance, Falotti's Swiss law termination notice and "forbidden" periods would not have provided a period of *continued employment*, but merely a limited right to "continued salary and benefits." (Opp. at 7 & n. 2). Yet as Falotti demonstrated in the proceedings below -- without any contradiction from Oracle -- Swiss employment continues in full force and effect throughout these

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[6] In any event, under the express language of the stock option plan, Falotti had the right to continue vesting in stock options for so long as he remained an employee of either Oracle "or [a] Subsidiary." (App. B to Pet. at 24a).

contractual periods, and all rights and obligations between employer and employee remain wholly intact for their duration. (Pet. at 3-4)(*citing* Swiss legal treatises and Swiss Supreme Court case law).[7]

Third, Oracle suggests that had it voluntarily chosen to release Falotti from performing further work duties during his termination notice and "forbidden" periods, Falotti would have had no right to "obtain reinstatement." But as Oracle is well aware, this suggestion is legally irrelevant. The Swiss Supreme Court has held as a matter of law that the employment relationship remains wholly intact for the duration of these contractual periods, irrespective of whether such a release has been granted. (Pet. at 3-4)(*citing* G. v. P. SA, ATF 118 II 140 (Swiss Supreme Crt. May 20, 1992))(SAD63). Oracle has never previously disputed this point, nor the fact that California law holds likewise. *See* (Pet. at 24-25).

Fourth, Oracle argues that Falotti's "right to vest in stock options depended entirely upon the terms of the Stock Option Agreement," rather than upon any rights that Falotti might enjoy under his employment agreement. (Opp. at 3). But this notion that Oracle's stock option plan somehow existed in a self-contained vacuum is obviously untenable.[8] Indeed, while the plan premises stock option rights on a "ceases to be employed" standard, it provides no definition for that

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[7] Falotti included translated copies of these Swiss law authorities in the record below and, until today, Oracle has never disputed their holdings. See, e.g., (5:ER1158, 1171; SAD63, 86-88, 188, 220-22, 276-81). Moreover, Oracle's further assertion that Falotti's "own Swiss law expert agreed that he was no longer a 'full-time' employee after" May 31, 2000 is simply untrue. *Compare* (Opp. at 5) *with* (4:ER1071, 1075, 1077-78; 5:ER1228).

[8] As even Oracle admits, the integration clause in the stock option plan covers only "the subject of stock options," and does *not* encompass any employment-related issues. (Opp. at 2).

phrase, and it is otherwise completely silent as to any and all employment-related issues. The one exception is language providing that the employment "relationship is [only] terminable in accordance with the terms of any agreement you have with the company governing the relationship."[9] Thus, the Compensation Committee's good faith obligations required them to look outside the stock option plan to the real world circumstances of Falotti's employment, and to the governing law that supplies common meaning to the plan's undefined terms.

In sum, had the dictates of international comity been followed in this case, the outcome would have been different because enforcement of Falotti's contractual and legal rights to continued employment would have entitled him to continued vesting in stock option until at least September 30, 2000 -- i.e., the first date on which Falotti even arguably "ceased to be employed."[10]

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[9] Oracle now argues that this language is intended to apply only to its "consultants or advisers," and *not* to its "employees or officers." (Opp. at 6). Oracle apparently would draw a distinction between its consultants and advisers who typically have written engagements with the company, and its *U.S.* employees and officers who are employed on a purely at-will basis without the benefit of written employment contracts. What Oracle fails to inform this Court, however, is that its senior *European* executives like Falotti are always required to execute written employment agreements, and thus are in a position directly analogous to Oracle's consultants and advisers, rather than to their *U.S.* executive counterparts.

[10] Besides disputing the importance of Falotti's Swiss law rights, Oracle now offers newly minted denials that it ever breached them. In the record below, however, Oracle candidly admitted to having informed Falotti in writing of its outright refusal to honor his contractual termination notice and "forbidden" periods. (7:ER1888-89).

CONCLUSION

For the foregoing reasons, and for the reasons previously set forth in his opening papers, Falotti respectfully requests that this Court grant his present petition for a writ of certiorari.

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